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Decisions September 81

REPORT

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ONTARIO LABOUR RELATIONS BOARD

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ONTARIO LABOUR RELATIONS BOARD REPORTS

**A Monthly Series of Decisions from the
Ontario Labour Relations Board**

Cited [1981] OLRB REP. SEPTEMBER

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also reported in *Canadian Labour Relations Boards
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1706-80-U; 1651-80-R Amalgamated Clothing and Textile Workers Union Applicant v. **Chandelle Fashions Ltd.** Respondent v. International Ladies Garment Workers Union Intervener

Practice and Procedure – Section 79 – Previous Board order directing compensation for lost wages – Company going into receivership – Complaint of non-compliance – Whether Board proceeding stayed by section 49 of *Bankruptcy Act*

BEFORE: R. O. MacDowell, Vice-Chairman, and Board Members J. A. Ronson and W. F. Rutherford.

APPEARANCES: *Beth Symes and Len Goguen for the International Ladies Garment Workers Union; David Starkman for the Amalgamated Clothing and Textile Workers Union; no one appearing for the respondent or Richter and Partners Inc.*

DECISION OF THE BOARD; September 8, 1981

1. This is an application under Section 79 of *The Labour Relations Act* involving certain employer unfair labour practices committed in the fall of 1980. By a decision dated July 17, 1981 (and for the reasons more particularly set out therein), the Board found that on October 21, 1980, Vittoria Bellissimo, Anna Cipressi, Lina Bisogni and Lisa Kronquist were unlawfully laid off by the respondent contrary to Sections 56, 58(a), 58(c) and 61 of the Act. These lay-offs were an attempt by the respondent to undermine the organizing campaigns of the Amalgamated Clothing and Textile Workers' Union and the International Ladies Garment Workers' Union which were then ongoing, and deprived the employees — key union supporters — of the wages and related benefits which they would have earned during the some six and one-half weeks when they were laid off (i.e. from October 21, 1980 to December 8, 1980). The Board directed that the respondent *forthwith* compensate each of the aggrieved employees for the wages and benefits lost during this period and remained seized of the matter in the event that any dispute might arise concerning the calculation of the amounts owing to each of the employees. The Board also issued a number of specific remedial directions designed to redress the unlawful interference with the two unions' organizing campaigns.

2. The Board's decision and order were both issued on July 17, 1981. Immediately upon receipt thereof, the two unions notified the respondent, (which was then being operated by a receiver), of their wish to meet to discuss the implementation of the Board's decision. The respondent advised that it was unwilling or unable to comply with any part of the Board's order; and consequently the unions sought a further hearing before the Board in order to settle the amounts payable to the employees, and establish a plan to implement the Board's other remedial orders. Notice of this intention was given to the respondent. Shortly thereafter the unions were advised that on August 4, 1981, a receiving order had issued with respect to the company. Both the unions, and the Board, subsequently received a document on the stationery of Richter and Partners Inc., Trustees in Bankruptcy, entitled "Notice of Stay of Proceedings", and drawing attention to Section 49 of the *Bankruptcy Act*. Because it was by no means clear whether, or the extent to which, Section 49 of the *Bankruptcy Act* was intended to stay or suspend statutory rights embodied in *The Labour Relations Act*, Richter and Partners was served with notice of the hearing which proceeded as scheduled. Although duly served, no one appeared on behalf of Richter and Partners to address the issues raised.

3. As we have already noted, on July 17, 1981, the Board directed that the respondent forthwith compensate the four aggrieved employees for the wages and related benefits which they lost during the six and one-half weeks during which they were unlawfully laid off. There is no issue before us concerning the calculation of the sums attributable to wages, to which the employees are entitled. Lina Bisogni's wage loss was \$1,420.77. Her total loss, exclusive of interest, but including holiday pay (\$85.25) and health insurance (\$8.45) is \$1,514.47. The interest component attributable to this loss and calculated in accordance with the formula set out in the Board's decision is \$54.47. Lisa Kronquist's loss of earnings amounts to \$1,319.50 in lost wages, and an additional \$79.17 in wage related holiday pay. The interest component associated with this loss is \$50.61. Anna Cipressi lost \$1,066.00 in wages and an additional \$63.96 in vacation pay. The related interest component is \$40.89. Vittoria Bellissimo obtained another job shortly after her lay-off and was involved in a car accident. Accordingly, her loss is \$364.00 in lost wages, an additional \$21.84 in vacation pay, and \$13.96 in interest. In summary, the total losses suffered by the employees are as follows:

Lina Bisogni	\$1,568.94
Lisa Kronquist	1,449.28
Anna Cipressi	1,170.85
Vittoria Bellissimo	399.80

The situation is somewhat complicated with respect to Bellissimo; however, there is no doubt that had the aggrieved employees not been unlawfully laid-off, they would have received wages and related benefits in the sums specified above.

4. These simple arithmetic calculations are not, and really cannot be, disputed. The real question involves the effect of the notice from Richter and Partners Inc., and the application of the *Bankruptcy Act*. The relevant provisions of the latter appear to be as follows:

2. "claim provable in bankruptcy" or "provable claim" or "claim provable" includes any claim or liability provable in proceedings under this Act by a preferred, secured or unsecured creditor;

"creditor" means a *person* having a claim, preferred, secured or unsecured, provable as a claim under this Act;

97. (1) Every creditor shall prove his claim, and a creditor who does not prove his claim is not entitled to share in any distribution that may be made.
- (2) A claim shall be proved by delivering to the trustee a proof of claim in the prescribed form.
- (3) The proof of claim may be made by the creditor himself or by some person authorized by him on behalf of the creditor, and, if made by a person so authorized, it shall state his authority and means of knowledge.

- (4) The proof of claim shall contain or refer to a statement of account showing the particulars of the claim and any counterclaim that the bankrupt may have to the knowledge of the creditor and shall specify the vouchers or other evidence, if any, by which it can be substantiated.
 - (5) The proof of claim shall state whether the creditor is or is not a secured or preferred creditor.
 - (6) Where a creditor or other person in any proceedings under this Act files with the trustee a proof of claim containing any wilfully false statement or wilful misrepresentation, the court may, in addition to any other penalty provided in this Act, disallow the claim in whole or in part as the court in its discretion may see fit.
 - (7) Every creditor who has lodged a proof of claim is entitled to see and examine the proofs of other creditors.
 - (8) Proofs of claims for wages of workmen and others employed by the bankrupt may be made in one proof by the bankrupt or someone on his behalf by attaching thereto a schedule setting forth the names and addresses of the workmen and others and the amounts severally due to them, but such proof does not disentitle any workman or other wage-earner to file a separate proof on his own behalf.
49. (1) Upon the filing of a proposal made by an insolvent person or upon the bankruptcy of any debtor, no creditor with a claim provable in bankruptcy shall have any remedy against the debtor or his property or shall commence or continue any action, execution or other proceedings for the recovery of a claim provable in bankruptcy until the trustee has been discharged or until the proposal has been refused, unless with the leave of the court and on such terms as the court may impose.
- (6) The provisions of this Act shall not be deemed to abrogate or supersede the substantive provisions of any other law or statute relating to property and civil rights that are not in conflict with this Act, and the trustee is entitled to avail himself of all rights and remedies provided by such law or statute as supplementary to and in addition to the rights and remedies provided by this Act.

5. Section 95 and 97 of *The Labour Relations Act* clothe the Board with exclusive jurisdiction to exercise the powers conferred on it by the Act. These powers include the responsibility to determine whether there has been a breach of the statute, and to fashion an appropriate remedy to redress the losses occasioned by the unlawful act. But these remedial

orders are not self-enforcing. It is left to the Courts to enforce them in the same manner as a judgement or order. Section 79 clearly distinguishes between the Board's responsibilities and those of the Court; moreover, the Board will not even file its order in Court so that an interested party can seek enforcement until there has been a positive termination of non-compliance. [See generally: *Re United Steelworkers of America and Chairtex Manufacturing Ltd. et al.* [1973] 3 O.R. 154 (C.A.)]. It is this mechanism of shared responsibility between the Board and the Courts, which may pose problems for the employees in the instant case — yet it cannot have been intended that employees deprived of their wages by their employer's illegal conduct should be in a worse position than employees who have not been illegally dealt with.

6. The proceedings under the *Bankruptcy Act* are, by virtue of Section 2, available to "creditors" with "claims provable" in bankruptcy. Counsel contends, however, that it is doubtful whether the grievors even have a claim provable in bankruptcy until this Board determines the amount to which they became entitled by the order of July 17, 1981, and declares that (despite the requirement that they be compensated "forthwith") no monies whatsoever were paid. Counsel argues that it is imperative that the Board exercise the statutory authority which it alone possesses, so that the employees will be in a position to press their claims in accordance with the procedure provided in the *Bankruptcy Act*. *There is no request to file the Board's order in Court, to seek enforcement or to levy execution to the prejudice of other creditors*; nor, contends counsel, does the present request involve the "recovery" of a claim provable in bankruptcy. It is a quantification and clarification of the Board's order of July 17, which may or may not provide the foundation for an employee claim, but which it is necessary for this Board to undertake before that matter can be assessed in another forum. Counsel argues further, that if this proceeding falls within the ambit of Section 49 at all, it is caught by the saving provision, Section 49(6). Since neither the rights of other creditors nor the proceedings under the *Bankruptcy Act* are prejudiced by this arithmetic calculation, it cannot be considered to be in conflict with the *Bankruptcy Act*. On the other hand, if this Board does not accede to the employees' request, they may be foreclosed from any recovery at all. Finally, contends counsel, it is important to give substance to the Board's order in order to protect any rights which may subsequently be available under Section 139 of the *Business Corporations Act* or *The Labour Relations Act* itself. Even if the Board's order turns out to be academic, it is desirable that it be quantified now while the evidence and the individuals constituting the quorum making the decision remains available.

7. As we have already mentioned, no one appeared on behalf of the trustee to speak to these issues, or draw our attention to any judicial authority on the question of whether the limited request made by the employees herein falls within the ambit of Section 49. What is clear, is that the statutory rights of the employees have been contravened, they have suffered losses of wages and benefits, and, if this Board does not quantify its own compensation order, the employees' right to recover those losses may be seriously delayed or impaired. Thus, while we have some doubt as to the efficacy of our finding, we are satisfied, in all the circumstances that we should declare that:

- (a) the aforementioned employees have lost wages and wage related benefits in sums more particularly set out in paragraph 3 hereof;
 - (b) although directed on July 17, 1981 to compensate the grievors forthwith, the respondent has failed to do so.
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0958-81-R United Brotherhood of Carpenters and Joiners of America, Applicant, v. **Clarence H. Graham Construction Limited**, Respondent, v. Group of Employees, Objectors.

Bargaining Unit – Construction Industry – Applicant seeking section 6(1) all employee unit – Seeking unit of all trades at work on application date – Whether Board continuing *Duron* principle in view of section 131a – Board setting out its policy re multi-trade applications

BEFORE: D. E. Franks, Vice-Chairman, and Board Members, W. H. Gibson and C. A. Ballentine.

APPEARANCES: *Douglas J. Wray, Bryon Black, James Caron, Dale Chappell and Karl Ball for the applicant; D. I. Wakely, G. Whyte and Richard Graham for the respondent; Robert C. Ellis, Ronald McKibbin and Kenneth Hewitson for the group of employees.*

DECISION OF THE BOARD; September 21, 1981

1. This is an application for certification made pursuant to the construction industry provisions of *The Labour Relations Act*.
2. The respondent is a general contractor. The employees affected by this application are working at a total of four job sites in Owen Sound. It is agreed by the parties that the job sites all involve work in the industrial, commercial and institutional sector of the construction industry. The employer has in his employ persons classified as carpenters and carpenters' apprentices, labourers, bricklayers and bricklayers' apprentices.
3. The applicant herein originally applied for the following bargaining unit:

"all carpenters, carpenter apprentices, and those employees performing work required by the respondent in the Province of Ontario, save and except non-working foremen and persons above that rank."

Accordingly, notice to the employees was given in terms of the bargaining unit applied for as set out above.

4. At the hearing in this matter the applicant trade union amended its position with respect to the appropriate bargaining unit. Rather than the one all encompassing unit set out above, the applicant requested two bargaining units. The first to be the normally appropriate bargaining unit for carpenters and carpenters' apprentices under section 131a(1) of *The Labour Relations Act*. The applicant also requested the Board to find a second unit to be appropriate under section 6(1) of the Act, namely, a unit consisting of construction labourers and bricklayers and bricklayers' apprentices in the local, Board geographic area, in this case area 28, Grey County.
5. There is no real question as to the appropriateness of the bargaining unit under section 131a(1) of the Act with respect to carpenters. Nor is there any question of notice to the employees resulting from the amendment since the second bargaining unit, namely the one under section 6(1) is smaller than the bargaining unit originally applied for. Consequently, the employees would have had adequate notice of this application. The question for the Board to

decide is the appropriateness of the second unit requested under section 6(1) of *The Labour Relations Act*.

6. As noted above, it is common ground between the parties that carpenters, labourers and bricklayers are all of the trades at work on the date of the making of the present application. Nor is it an issue before the Board that the work being performed by labourers and bricklayers and bricklayers' apprentices is work falling outside the normal craft bargaining unit of the carpenters union. In these circumstances the Board's approach to bargaining unit problems such as the present one is set out in the *Duron Ontario Limited* case, [1976] OLRB Rep. Nov. 734,

"...The Board, in applications under the construction industry provisions of *The Labour Relations Act*, frequently determines bargaining units under section 6(1). Such bargaining units are from time to time expressed in terms of, for example, "carpenters and carpenters' apprentices" or "electricians and electricians' apprentices".

In addition, bargaining units which are also expressed in terms of "carpenters and carpenters' apprentices" and "electricians and electricians' apprentices" are also determined by the Board pursuant to section 6(2). The basic approach of the Board in applications for certification under the construction industry provisions of *The Labour Relations Act* is to determine bargaining units pursuant to section 6(2) where a trade union requests a craft bargaining unit and satisfies the provisions of section 6(2). Where an application is made by a trade union which while able to satisfy the provisions of section 6(2) requests a bargaining unit which is not its craft unit, then the Board considers the appropriateness of the bargaining unit under section 6(1). With respect to section 6(1) in applications under the construction industry provisions, the Board considers that appropriate bargaining units consist of all named trades or classifications which are not represented by a trade union and which are at work on the date of filing.

Trade unions such as the Christian Labour Association of Canada, The Christian Trade Unions of Canada, the National Council of Canadian Labour and the Lumber, Sawmill Workers Union are not craft trade unions and do not satisfy the provisions of section 6(2). The appropriate bargaining units for such trade unions are determined pursuant to section 6(1). In the event that such trade unions apply for certification in situations where an employer has only employees of a particular craft or classification at work on the date of filing, then such trade union is usually granted certification with respect to such particular craft or classification pursuant to section 6(1), for example, "carpenters and carpenters' apprentices" or "electricians and electricians' apprentices". Such bargaining units resemble in description similar craft units which in appropriate situations are determined pursuant to section 6(2). This resemblance, however, is fortuitous and results from an employer having only one craft or classification at work on the date of the filing. In the event that an employer has employees of more than one craft or

classification at work on the date of filing, then a trade union which does not satisfy the provisions of section 6(2) is not permitted to selectively seek certification for only one craft or classification. Rather the appropriate bargaining unit consists of all unrepresented employees as designated by their craft or classification who were at work on the date of filing in a given geographic area pursuant to section 6(1). Where a bargaining unit has been determined in terms of, for example, “carpenters and carpenters’ apprentices” or “electricians and electricians’ apprentices”, such units are generally appropriate pursuant to section 6(2) with respect to an appropriate craft trade union and are appropriate pursuant to section 6(1) with respect to trade unions which do not satisfy the provisions of section 6(2) where only such crafts are at work on the date of filing.

From time to time the set of circumstances which are present in this application are presented to the Board. The Board characterizes this application as a situation where an incumbent craft trade union represents members of a craft — cement masons and cement masons’ apprentices — and where some of them have indicated a preference to be represented by another trade union. In these situations, the Board has generally held that the appropriate bargaining unit is the unit in the collective agreement. The unit in the collective agreement is regarded as a displacement unit and is determined with reference to section 6(1) and not section 6(2). Reference is made to the *J. McLeod and Sons Limited* case, OLRB Rep. Dec. 1969, p. 1100 and to the *Canwall Contractors Limited* case OLRB Rep. July 1975 p. 532. If the Board were to accept the argument that in a displacement situation the appropriate bargaining unit is to be determined with reference to section 6(2); this would mean, in many instances, that only an incumbent trade union would possess the necessary requirements to represent a given craft notwithstanding a wish by certain members of that craft to have another trade union represent them in collective bargaining. In our view, under *The Labour Relations Act* no trade union possesses a monopoly with respect to representing any bargaining unit of employees. In our opinion, the root cause of the arguments over the appropriateness of the bargaining unit is grounded in a view that trade unions in the construction industry should not as a matter of principle cross craft lines in their organizing activities.

Many arguments may be made in support of this point of view. Such a point of view, however, is best debated within the ranks of trade unions rather than before the Board.”

The question which arises in the present case is whether the Board can or ought to continue the policy set out in the *Duron* case in view of section 131a of the Act. That section reads as follows:

“131a - (1) An application for certification as bargaining agent which relates to the industrial, commercial and institutional sector of the construction industry referred to in clause *e* of section 106 shall be brought by either,

- (a) an employee bargaining agency; or
- (b) one or more affiliated bargaining agents of the employee bargaining agency,

on behalf of all affiliated bargaining agents of the employee bargaining agency and the unit of employees shall include all employees who would be bound by a provincial agreement together with all other employees in at least one appropriate geographic area unless bargaining rights for such geographic area have already been acquired under subsection 3 or by voluntary recognition.

- (2) If on the taking of a representation vote more than 50 per cent of the ballots cast are cast in favour of the trade unions on whose behalf the application is brought, or, if the Board is satisfied that more than 55 per cent of the employees in the bargaining unit are members of the trade unions on whose behalf the application is brought, the Board shall certify the trade unions as the bargaining agent of the employees in the bargaining unit and in so doing shall issue a certificate confined to the industrial, commercial and institutional sector and issue another certificate in relation to all other sectors in the appropriate geographic area or areas.
- (3) Notwithstanding subsection 1 of section 108, a trade union represented by an employee bargaining agency may bring an application for certification in relation to a unit of employees employed in all sectors of a geographic area other than the industrial, commercial and institutional sector and the unit shall be deemed to be a unit of employees appropriate for collective bargaining.
- (4) A voluntary recognition agreement in so far as it relates to the industrial, commercial and institutional sector of the construction industry shall be between an employer on the one hand and either,
 - (a) an employee bargaining agency;
 - (b) one or more affiliated bargaining agents represented by an employee bargaining agency; or
 - (c) a council of trade unions on behalf of one or more affiliated bargaining agents affiliated with the council of trade unions,

on the other hand, and shall be deemed to be on behalf of all the affiliated bargaining agents of the employee bargaining agency and the defined bargaining unit in the agreement shall include those employees who would be bound by a provincial agreement.

- (5) Notwithstanding subsections 1 and 4, a trade union that is not

represented by a designated or certified employee bargaining agency may bring an application for certification or enter into a voluntary recognition agreement on its own behalf.”

An examination of this section shows that applications for certification can be made pursuant to subsections 1, 3 or 5. Both subsections 1 and 3 deal with applications for certification by trade unions covered by the regime of province wide bargaining (subsection 1 deals with applications for all sectors including the industrial, commercial and institutional sector, whereas subsection 3 deals with applications for sectors excluding the industrial, commercial and institutional sector). Subsection 5 deals with applications by “a trade union that is not represented by a designated or certified employee bargaining agency”, that is trade unions not under the regime of province wide bargaining. For such trade unions it is clear that they are not affected by subsections 1 through 4, and clearly the Board policies set out in the *Duron* case continue to apply with respect to applications for certification by such trade unions. In light of the foregoing, it is clear that since section 131a deals with both applications for certification by trade unions under the province wide bargaining provisions of the Act, and also those not under the province wide bargaining provisions in the Act it deals with all possible applications for certification in the construction industry. Therefore, there can be no appropriate bargaining unit found under section 6(1) as requested by the applicant outside of section 131a.

7. For those unions covered by the regime of province wide bargaining, subsection 1 and subsection 3 of section 131a apply. Subsection 3 applications are brought at the option of the trade union involved and by that subsection they can apply for certification in sectors other than the industrial, commercial and institutional sector (and thus outside the provincial bargaining scheme), and in such cases the appropriate bargaining unit is all sectors other than the industrial, commercial and institutional sector in the appropriate board area. However, where a union covered by the provincial bargaining scheme, wants the application *to relate to* the industrial, commercial and institutional sector of the construction industry it must apply under subsection 1.

8. Having regard to the foregoing, it is clear that section 131a deals with both applications for certification by trade unions under the province wide bargaining provisions of the Act, and also those trade unions not under the province wide bargaining provisions of the Act. It deals with all possible applications for certification in the construction industry. It would follow, therefore, that whether the Board makes a finding of an appropriate unit under section 6(1) or section 6(2) of the Act, that such a finding must be made within the confines of section 131a, thus the Board cannot as the applicant suggests find an appropriate unit under section 131a(1) and a separate appropriate unit under section 6(1) outside the purview of section 131a. The Board must first deal with section 131a and apply section 6 in relation to section 131a. This requirement is clearly set out in section 126 which reads as follows:

“126. Where there is conflict between any provision in sections 127 to 136 and any provision in section 5 to 49 and 54 to 124, the provisions in sections 127 to 136 prevail.”

9. The language of subsection 1 is quite specific with respect to the instructions given to the Board as to the appropriate bargaining unit,

“The unit of employees shall include all employees who would be bound by a provincial agreement together with all other employees in at least one geographic area.”

The term provincial agreement is defined in section 125(1)(e) and reads as follows:

“125.-(1) In this section and in sections 126 to 136,

- (e) “provincial agreement” means an agreement in writing covering the whole of the Province of Ontario between a designated or accredited employer bargaining agency that represents employers, on the one hand, and a designated or certified employee bargaining agency that represents affiliated bargaining agents, on the other hand, containing provisions respecting terms or conditions of employment or the rights, privileges or duties of the employer bargaining agency, the employers represented by the employer bargaining agency and for whose employees the affiliated bargaining agents hold bargaining rights, the affiliated bargaining agents represented by the employee bargaining agency, or the employees represented by the affiliated bargaining agents and employed in the industrial, commercial and institutional sector of the construction industry referred to in clause *e* of section 106.”

That section deals with the bargaining rights held by “affiliated bargaining agents”. That term is in turn defined by section 125(1)(a),

“125.-(1) In this section and in sections 126 to 136,

- (a) “affiliated bargaining agent” means a bargaining agent that, according to established trade union practice in the construction industry, *represents employees who commonly bargain separately and apart from other employees* and is subordinate or directly related to, or is, a provincial, national or international trade union, and includes an employee bargaining agency.” (emphasis added)

Thus, those employees who would be covered by a provincial agreement are those represented by the applicant union “who commonly bargain separately and apart from other employees”. In the present case that would be employees falling within the trade of carpenter. Clearly, neither bricklayers nor labourers would be covered by the provincial agreement made on behalf of the applicant, amongst others, by the designated employee bargaining agency representing the applicant.

10. Insofar as the present application relates to the industrial, commercial and institutional sector of the construction industry, it is clear that those employees described as labourers and bricklayers would be outside the provincial agreement, and therefore, outside the regime of provincial bargaining. However, as noted above, since section 131*a* deals with all applications for certification in the construction industry, and the applicant is clearly not

applying for bricklayers and labourers under subsection 3 and cannot apply under subsection 5, it can only apply for labourers and bricklayers under subsection 1. However, since they would not be covered by the provincial agreement relating to carpenters we are of the view that they would not be appropriate for inclusion in the unit found to be appropriate in the present case.

11. It should be noted that section 131a(1) says “shall include all employees who would be bound by a provincial agreement”. Normally this would imply that the Board has the power to include employees other than those covered by the provincial agreement. In the present case, however, this becomes a matter of including in a bargaining unit or series of bargaining units employees covered by the regime of provincial bargaining, together with employees outside the provincial bargaining regime. Clearly, subsection 3 and subsection 5 of section 131a deal with matters relating to employees outside the regime of provincial bargaining and we propose to limit the appropriate unit in this case to only those covered by the regime of provincial bargaining. In so doing we are of the view that this is consistent with the provisions of the Act relating to the provincial bargaining. To certify the applicant in the present case for employees in the industrial, commercial and institutional sector in the construction industry, but outside the scheme of provincial bargaining, would create representation rights for trade unions within that scheme for employees outside the regime of provincial bargaining. Such representation would clearly be disruptive of the overall scheme contemplated in sections 125 to 136.

12. In view of the foregoing, we find that the only appropriate bargaining unit relates to carpenters and carpenters’ apprentices and that the appropriate unit for collective bargaining in the present case does not include construction labourers and bricklayers and bricklayers’ apprentices, since they are not appropriate for inclusion under section 131a(1) and we can therefore find no separate and distinct unit under section 6(1) of the Act. In this regard, we are therefore of the view that the reasoning set out in the *Duron* case no longer applies to applications under section 131a(1).

13. The Board therefore finds that the applicant is a trade union within the meaning of section 1(1)(n) of *The Labour Relations Act* and is an affiliated bargaining agent of a designated employee bargaining agency. Pursuant to the designation issued by the Minister under section 127(1) of the Act on April 10, 1980, the designated employee bargaining agency is the United Brotherhood of Carpenters and Joiners of America and the Ontario Provincial Council of the United Brotherhood of Carpenters and Joiners of America.

14. The Board further finds, pursuant to section 131a(1) of the Act, that all carpenters and carpenters’ apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all carpenters and carpenters’ apprentices in the employ of the respondent in all other sectors in the County of Grey, save and except non-working foremen and persons above the rank of non-working foreman, constitute a unit of employees of the respondent appropriate for collective bargaining.

15. The Board hereby appoints a Labour Relations Officer to inquire into the lists of employees in the bargaining unit and to report back to the Board.

**0076-81-U International Union of Operating Engineers, Local 793,
Complainant, v. The Corporation of the Town of Meaford, Respondent.**

Change in Working Conditions – Duty to Bargain in Good Faith – Interference in Trade Unions – Section 79 – Employer withholding customary wage increase – Insisting on lower wage rates for unionized employees – Making direct offer of wage increase to employees – Whether breach of freeze provisions and duty to bargain in good faith – Whether interference with trade union

BEFORE: M. G. Mitchnick, Vice-Chairman, and Board Members C. G. Bourne and H. Simon.

APPEARANCES: *S. B. D. Wahl for the complainant; D. Hersey for the respondent.*

DECISION OF M. G. MITCHNICK, VICE-CHAIRMAN, AND BOARD MEMBER H. SIMON; September 15, 1981

1. This is a complaint under section 79 of *The Labour Relations Act*, alleging a violation of sections 14, 56, 58, 59 61 and 70 of the Act. Specifically, the complaint alleges that the respondent:

- “(i) failed or refused to bargain in good faith and make every reasonable effort to make a collective agreement;
- (ii) participated in or interfered with the administration of a trade union, namely, the Complainant, or the representation of the employees of the Respondent by the Complainant;
- (iii) sought by threat of dismissal or by any other kind of threat or by the imposition of a pecuniary or other penalty or by any other means to compel employees to refrain from becoming or refrain from continuing to be or to cease to be a member of a trade union, namely the Complainant, or to exercise any other rights under the Act;
- (iv) so long as a trade union, namely, the Complainant, continues to be entitled to represent the employees in the bargaining unit, bargained with its employees;
- (v) sought by intimidation or coercion to compel its employees to refrain from becoming or to refrain from continuing to be or to cease to be a member of a trade union, namely the Complainant, or to refrain from exercising any other rights under the Act;
- (vi) altered the rates of wages or any other term or condition of employment or any right, privilege or duty of the Employer in circumstances where notice has been given under Section 13 that no collective agreement is in operation in the absence of consent of the trade union, namely, the Complainant.”

2. On July 9, 1980, the applicant was certified on an interim basis as exclusive

bargaining agent for the four employees of the respondent's Works Department. The main thrust of the applicant's complaint is that the respondent employer, by withholding the annual increase granted to non-union employees of the Town, and by insisting on a form of collective agreement which would leave the members of the bargaining unit continually behind the other employees, sought to convey to the employees of the Works Department that they were being penalized for electing to engage in collective bargaining, and thus intimidate them into abandoning their bargaining agent.

3. It has been the practice of the Town to apply an across-the-board percentage increase to all of its employees each year on a January 1st to December 31st basis. The amount of this increase is not determined until the budgets are completed in the late spring or early summer. The increases are then implemented at approximately the beginning of July each year, and made retroactive to January 1st. The only exception to this arrangement has been with respect to the Town's police force, whose members have been represented for a number of years by a trade union. As the terms of the policemen's collective agreement are of course subject to negotiation each year, the annual adjustment for other employees does not apply to them, but rather, their settlement terms, when reached, are applied retroactive to January 1st. The collective agreements for the members of the police force have always been on a January 1st to December 31st basis.

4. The complainant filed its application for certification for this bargaining unit on October 31, 1979. The other employees of the Town received their general increase, being 8% for 1980, around the beginning of July 1980. The increase was not applied to the members of the Works Department. Notwithstanding the application for certification, the members of the Works Department continued to attempt to bargain directly with the Town through their superintendent, Mr. Gilray, presenting a written list of their demands, according to past practice, as late as April of 1980. They were advised by Mr. Gilray that nothing could be done until the union matter was resolved one way or the other.

5. Negotiations with the Town were carried out by Mr. Bernard McMillan, the applicant's business representative for the area. Mr. McMillan, for his part, was concerned from the outset that the employees for whom the union was seeking bargaining rights would not be deprived of any of their customary wage increases. This became a more pressing concern in July of 1980, when the general increase was implemented for the Town and the members of the Works Department were excluded. The members of the Works Department began to complain to Mr. McMillan about this, and Mr. McMillan approached Mr. Ferguson, the Chairman of the Town's negotiating committee, with a request that the 8% be implemented. Mr. Ferguson indicated to Mr. McMillan that he would get back to him with respect to this request, but apparently never did. The 8% was not implemented for the members of the Works Department, and continued to build as a sore point amongst the men.

6. A number of negotiating meetings took place between the parties over the summer, and in September of 1980 the union applied for conciliation. On October 27th the parties attended a meeting with the conciliation officer in Toronto. The Mayor of the Town testified that it was never his intention to give the Works Department any more than the 8% granted to other employees of the Town. That was the position of the Town in negotiations throughout. He testified that in his view the men had little bargaining power, as their work could readily be contracted out if necessary. In addition, the Town adopted the position that the term of the agreement had to be one year from the date of signing. The only explanation for the Town's

position in this regard was given through the evidence of the Mayor, whose evidence on the matters at issue was extremely vague. The Mayor explained that he had little familiarity with the thinking of the Town's negotiating committee, as the directing mind of the negotiations had been Reeve Ferguson. The Mayor indicated that, for his part, he did not think that a term of January 1 to December 31, in line with the police contract, had ever been seriously considered, but also indicated no knowledge of whether the union had ever asked for that. The Mayor did testify that there had been some discussion that a contract date of October would allow the Town to use the negotiated settlement with the union each year to act as a guideline for the increases to be applied to the Town's other employees. The Mayor conceded at the same time that this strategy, in the circumstances, would have the effect of placing the Works Department a year behind the other employees of the Town with respect to the timing of their increases. At the conciliation meeting on October 27th, the Town for the first time offered retroactivity to January 1, 1980, in the form of a signing bonus, although the Mayor testified that there had never been any question in his mind but that the Works Department employees would be given their increase retroactively. He stated in cross-examination that he could offer no explanation as to why the Town had declined to offer retroactivity prior to the conciliation meeting of October 27th. Mr. McMillan, who was at the October 27th meeting representing the employees on his own, testified that he decided that what the Town was offering at that point was the best that he was going to be able to do for the men, and accordingly agreed to sign a memorandum of settlement that day, subject, as usual, to ratification by the members.

7. Following the conciliation meeting and the signing of the memorandum of settlement, the first individual from either negotiating committee to arrive back in Meaford was Mr. Ferguson. The evidence is that Mr. Ferguson regularly drives a school bus for the Town, and that it is not unusual for him to stop into the coffee shop and chat with the employees in the Works Department about matters of a social nature. On this day, however, Mr. Ferguson did not confine himself to "social" matters, but rather went directly to the coffee shop upon arriving in Meaford, and began discussing with the employees the fact that a memorandum of settlement had just been signed. The memorandum of settlement of course obtained for the members of the Works Department the same 1980 increase granted to other employees of the Town, but locked them into that increase until October 1981. The only direct evidence of what was said by Mr. Ferguson came from Mr. Merrifield, who was summonsed by the complainant as a witness, and ultimately was declared by the Board to be hostile. Following the Board's ruling, Mr. Merrifield appeared to the Board to be making a sincere attempt to be accurate in his evidence, but appeared to have some difficulty in following certain questions. Portions of his testimony leave no doubt that Mr. Ferguson told the employees they would receive the 8% increase whether they ratified the memorandum of settlement or not. Other points in his testimony were, however, less clear in this regard. Had the Board been called upon to weigh Mr. Merrifield's evidence on this point against that of another credible witness, the Board may not have made a finding of fact against the respondent on the basis of Mr. Merrifield's evidence alone. The fact is, however, that even though this incident was central to the complainant's case against the Town, and indicated as such by the Board, from the outset, Mr. Ferguson was not called by the respondent to testify. Considering Mr. Merrifield's evidence as a whole, the Board concludes that the employees in that discussion were in fact told by Mr. Ferguson that they would receive the 8% increase whether they ratified the contract or not.

8. When Mr. McMillan arrived in Meaford later on that same day, he convened a Subsequently, a second motion was considered by Council and passed, in the following form:

meeting which was attended by three of the four Works Department employees. Mr. McMillan explained to the men that he had signed the memorandum of settlement because it was his view that he was not going to be able to get any more for them, and indicated further that he could give no assurance that they would even receive the 8% if they turned the contract down. Mr. McMillan was advised by the employees present that they had no interest in accepting the proposed contract, and that they had concluded that they could "do better without the union". The men indicated that they would poll the fourth member of the Works Department, who was not at the meeting, and let Mr. McMillan know his views as well. Mr. McMillan testified that at the time he was pleased that the men had the courage to turn down the contract as they did, because, as he explained, he "did not like to see men's noses rubbed in the dirt". Mr. Merrifield testified that he and the other men felt that they were actually in a worse position under the proposed contract than the other members of the Town, since an October contract date would mean that the other employees in the Town would get their increase every year several months sooner. He testified that it was the view of the employees that the union would simply "drop out of the situation" if the employees refused to accept the contract.

9. The union was, in fact, strangely silent for some time following the rejection of the contract. Mr. McMillan testified that he advised the conciliation officer at once of the contract rejection, but that he was unsuccessful in repeated attempts to make contact with the solicitor handling the negotiations for the Town. Mr. McMillan did not suggest in his evidence that he ever left a message which was unreturned by the Town solicitor, and the Board has serious doubts about the efforts which Mr. McMillan put into contacting the Town at this point. Mr. McMillan did report the outcome of the negotiations back to his superiors at this stage, and acknowledged that they were considerably displeased with some of the language he had reluctantly agreed to include in the proposed collective agreement. This involved, in particular, the language with respect to "Management Rights" and "No Strike". A "no-board" report was issued by the Minister of Labour dated November 18, 1980, thereby establishing a strike deadline of early December. There was, however, apparently no talk of a strike amongst the employees in the bargaining unit.

10. In the meantime the Town was of the view, according to the Mayor, that once the memorandum of settlement had been signed, it was appropriate to go ahead and implement the agreed-upon increase. A motion to do so was put before the Town Council at a meeting of November 3, 1980. The initial resolution, put forward by Mr. Ferguson, stated as follows:

"Moved by Mr. Elmer Ferguson

Seconded by Mr. Alfred Willis

WHEREAS a representative of the International Union of Operating Engineers, Local 793, a Conciliator appointed by the Minister of Labour and the Chairman of the Public Works Committee signed a Memo Agreement on the 27th day of October, 1980 regarding back wages for the employees covered by the Agreement,

NOW THEREFORE be it resolved that the employees Jack Webster, Stewart Merrified and Bev Parkin receive 8% of their gross earnings of 1979, retroactive to January 1st, 1980, subject to Union approval as well as the approval of the Municipal Solicitor."

The discussion in voting on this motion was conducted *in camera*. The motion was defeated.

"Moved by Mr. Elmer Ferguson

Seconded by Mr. Alfred Willis

That the Works Department employees, namely Jack Webster, Stewart Marrifield and Bev Parkin be granted an 8% increase of their 1979 wages for the year 1980, subject to the Town's solicitor approval.

— Carried."

As can be seen, all reference to the union was removed in the second motion. The Mayor was asked on cross-examination whether, subsequent to the passing of this motion, legal counsel was in fact consulted prior to implementing the increase, and the Mayor testified only that he assumed that this was done, but that he himself took no part in the matter. In any event, the increase was implemented and reflected in the paycheques of the members of the bargaining unit, apparently in late December (and probably outside the section 70 "freeze period").

11. On December 17, 1980, the government mediator, Mr. Hopper, advised the parties that he would convene a meeting in Owen Sound on January 12, 1981. On January 5, 1981, counsel for the Town wrote the following letter to Mr. McMillan, the applicant's business representative:

"We act as counsel for the above noted Corporation and write to clarify its position with respect to the recently negotiated collective agreement with your Union dated October 27, 1980.

The collective agreement was valid in all respects save that it required ratification by the respective parties. We have been advised that the Union has been unable to have the agreement ratified and that indeed no employee in the bargaining unit is prepared to authorize its execution by your Union. This understandably places the Corporation in a difficult position.

We have reviewed the Constitution of your Union to determine whether it would have any status to sign such a collective agreement notwithstanding the unanimous rejection by the employees. On our reading of your Constitution, ratification by the membership is necessary and it would appear therefore that your Union has no jurisdiction to sign this agreement until ratification is achieved.

We are advised that the Corporation remains willing to execute the agreement as soon as these objections have been resolved. If you do not agree with our interpretation of the situation or the law, we would encourage you to bring the matter before the Ontario Labour Relations Board for resolution.

We have advised Mr. Hopper of the contents of this letter and will in the interim agree to the interim arrangements arrived at with you concerning the recent wage increases."

There is nothing in the evidence to indicate why the Town at this stage was pointing out to the

applicant that it could not sign a collective agreement in the absence of ratification. There was, in addition, nothing in the evidence to suggest any "interim arrangements" had been made with the applicant to implement the wage increases irrespective of ratification, and of course the increases had already been implemented by this point. As counsel for the Town was engaged in other negotiations at the offices of the Ministry of Labour in Toronto on January 12th, the meeting called by Mr. Hopper in fact took place in Toronto, and lasted only a few moments. On behalf of the applicants, Mr. Redshaw attended this meeting along with Mr. McMillan. Mr. Redshaw indicated that there were four items in dispute, being wages, duration, management rights and no-strike, and stated that these four areas had to be resolved before a ratified agreement would be possible. Counsel for the Town expressed the Town's view that it had a signed memorandum, and was not prepared to improve on the deal that had been made. Counsel for the Town also asked some questions about the applicant's constitution and its right to sign a collective agreement in the absence of ratification, and Mr. Redshaw apparently undertook to provide Town counsel with a copy of the constitution. Apparently an issue also arose as to whether any ratification meeting had taken place at all. The meeting ended with Town counsel affirming that there was no movement on the part of the Town, but indicating that he would seek further instructions.

12. At this point, the applicant retained counsel of its own. The applicant's counsel wrote to the Town counsel on February 20, 1981, pointing out the respondent's acknowledged awareness that the employees had failed to ratify the memorandum of settlement, and submitting that "the parties are obliged to meet and continue bargaining". Applicant's counsel closed by calling a negotiating meeting at its own offices for March 19th. Town counsel replied by letter of February 23rd, making reference to the meeting of January 12th. In particular, Town counsel set out his understanding of the meeting (which differs substantially from that of the applicant), as follows:

At that meeting your clients confirmed that they were unable to get any of the employees in the bargaining unit to attend a meeting in order to ratify the memorandum of settlement. They stated that they felt their constitution allowed them to sign the agreement notwithstanding such lack of ratification and to forward a copy.

Town counsel then went on to indicate:

We can only conclude that your clients have personally changed their minds and wish themselves to change the terms of the collective agreement which they have negotiated.

Applicant's counsel responded by reminding Town counsel of his earlier acknowledgement that the employees had "failed to ratify" the memorandum of settlement, and also of the fact that the memorandum was made expressly subject to ratification. In consequence, applicant's counsel reaffirmed the position of the applicant that, there having been no ratification, it was not in any event prepared to sign a collective agreement, and that the provisions of its constitution were accordingly irrelevant. Once again, the applicant's counsel called upon the Town to bargain. After some further clarification, it became clear that the dispute between the parties was over the question whether the terms of the memorandum of settlement had ever been placed before the employees for ratification, and on March 19, 1981 Town counsel wrote to the applicant's counsel as follows:

We have for reply your letter of March 18, 1981 in which you rather peremptorily command the Company to attend for a negotiating session in your offices on March 19th next. You may be assured that should our clients deem it advisable to have further discussion with your clients, any such meeting will take place in Meaford as has been the practice.

There appears to be a misunderstanding with respect to the position of the members of the bargaining unit on the Memorandum of Settlement dated October 27, 1980. It is our understanding that the members of the bargaining unit have refused to comment on it and indeed have refused to attend any meeting with your clients. In the result, any request by your clients now to renegotiate the Memorandum of Settlement would be simply an attempt to reverse a position already taken at the bargaining table. We consider that to be bargaining in bad faith and do not recognize any obligation on the part of our clients to be party to any such negotiation meeting.

If your clients are prepared to supply evidence showing that a proper ratification meeting has been called and that the members of the bargaining unit did indeed fail to ratify the settlement for reasons which should be reviewed in a further negotiation meeting, then undoubtedly our clients would be prepared to comply. Failing any such evidence and indeed in the light of comments from your clients to the contrary, our clients are not prepared to meet.

13. Applicant's counsel continued to urge that bargaining resume, and on April 9, 1981, filed the present complaint. On April 27, 1981, Town counsel wrote to him the following letter:

Pursuant to his appointment as labour relations officer in the above matter Mr. Bowman is convening a meeting of the parties on Thursday, April 30th next at 10:00 a.m.

If the complainant maintains its position of refusing to sign the memorandum of settlement and wishing to negotiate the management rights clause, no strike clause, wage rate schedule and duration, it occurs to the undersigned that this meeting might be utilized to hear your client's submission and allowing the respondent to reply thereto. Such negotiations would of course be without prejudice to the respondent's position that there has been no violation of the Act to date and that there is no requirement to even hold these negotiations in light of the very questionable circumstances concerning the ratification vote.

We of course have requested particulars of this alleged ratification meeting and vote and will expect those imminently.

This letter would therefore serve to put your clients on notice that they should come to the meeting scheduled for April 30th prepared to discuss the four issues apparently of concern to them and to receive at that time a final position from the respondent.

14. The meeting of April 30th began with Town Counsel again cautioning that the Town's willingness to negotiate could not be taken as an admission that the Town had failed to negotiate in good faith before. The Board notes that this is not an unusual position for counsel to take when entering upon negotiations towards a settlement in the face of outstanding litigation. For reasons which are not clear from the evidence, however, the applicant expressed concern over the pre-conditions of the respondent, and the meeting degenerated into a discussion of whether the ensuing efforts to negotiate were going to be all "on the record" or all "off the record". The result was the meeting broke off without any attempt at resolution. The Board does not have sufficient information before it to be critical of either party for this breakdown, but simply notes that as a result of the procedural wrangling between counsel, the opportunity for a comprehensive settlement at this stage was lost.

15. The applicant complains of a violation of section 70 of *The Labour Relations Act* in connection with the respondent's treatment of the customary wage increase for the members of the bargaining unit. Section 70 provides:

70.-(1) Where notice has been given under section 13 or section 45 and no collective agreement is in operation, no employer shall, except with the consent of the trade union, alter the rates of wages or any other term or condition of employment or any right, privilege or duty, of the employer, the trade union or the employees, and no trade union shall, except with the consent of the employer, alter any term or condition of employment or any right, privilege or duty of the employer, the trade union or the employees,

(a) until the Minister has appointed a conciliation officer or a mediator under this Act, and,

(i) seven days have elapsed after the Minister has released to the parties the report of a conciliation board or mediator, or

(ii) fourteen days have elapsed after the Minister has released to the parties a notice that he does not consider it advisable to appoint a conciliation board,

as the case may be; or

(b) until the right of the trade union to represent the employees has been terminated,

whichever occurs first.

(2) Where a trade union has applied for certification and notice thereof from the Board has been received by the employer, the employer shall not, except with the consent of the trade union, alter the rates of wages or any other term or condition of employment or any right, privilege or duty of the employer or the employees until,

(a) the trade union has given notice under section 13, in which case sub-section 1 applies; or

- (b) the application for certification by the trade union is dismissed or terminated by the Board or withdrawn by the trade union.

Counsel for the complainant argues that it was a violation of the requirements of section 70, in the absence of the trade union's consent, for the respondent on the one hand to initially fail to implement the 8% increase, and then on the other hand to do so. This appears similar to the position taken before the Board in *Scarborough Centenary Hospital*, [1969] OLRB Rep. Jan. 1049, where the Board noted, at paragraph 18:

...it would appear on the facts of this case that with respect to the implementation of the annual increase, the respondent will be damned if it does and damned if it doesn't in the view of the applicant if it acts without the applicant's consent.

Clearly, as the Board observed in that case, the respondent cannot be wrong on both counts. The question in each case is to determine whether the violation lies in granting the increase, or in not granting it, and is one which has given labour relations tribunals considerable difficulty over the years (compare, for example, the approach of the Canada Labour Relations Board in *Royal Bank of Canada*, 78 CLLC ¶16,132, with that of the same Board in *Canadian Imperial Bank of Commerce*, 80 CLLC ¶16,001). With respect to our own Board, the issue in the present case appears to have been decided by *Lennox and Addington County General Hospital*, [1978] OLRB Rep. Sept. 843 and *Spar Aerospace Products Limited*, [1978] OLRB Rep. Sept. 859.

16. The question in a case like this is whether the reference in section 70 to any alteration in the "rates of wages" means that the *actual* rates of wages in effect at the onset of the "freeze" period are to be maintained, or whether it is the employer's *policy* or *practice* with respect to rates of wages which must be maintained. Either interpretation is defensible in some respects, but this Board has made it clear that it is the latter view which best accords with the overall language and purpose of the statute. In *Lennox and Addington*, it was indisputably the employer's policy to grant across-the-board annual increases to employees in January each year. A 4% increase was approved by the Hospital Board and implemented in January 1978 for all employees except those for whom the trade union had just been certified. The Board commented as follows:

7. It was the contention of the respondent that there was no contractual obligation to pay an annual increase and that such an increase was not guaranteed but came purely *ex gratia* from the employer. It was argued that while it may have been a policy to give an annual increase, "policy" was not a matter falling within the ambit of sections 70 and 10 of the respective Acts.

8. We are unable to accept the contention of the respondent. While it is true that no promise of payment for 1978 was made to the employees concerned, the evidence is uncontradicted; indeed, it is that of the respondent, as already noted, that an annual increase had been given each year for the nine years preceding 1978. There can be no doubt that this policy which has been thus sustained over such a length of time established in the employees concerned a reasonable expectation of its continuation in 1978, and is thus a matter falling within the scope of

sections 70 and 10 of the respective Acts (see *Kiddies Toys Manufacturing Co. Ltd.*, 65 CLLC ¶14,040). In the present case it is clear that no indication of any intent to deny the customary increase had been communicated to the employees concerned prior to the commencement of the freeze period (*Carleton University*, [1978] OLRB Rep. Feb. 184).

9. The evidence of [the respondent] is that the employees in the bargaining unit would have received the annual increase that was given, in accordance with past practice, to the other employees, had it not been for the application for certification and the respondent's understanding that the increase was prohibited under sections 70 and 10 referred to above.

10. Clearly, in the normal course of events, the respondent would have given the 4% increase to the employees in the bargaining unit in accordance with its long-standing policy as it did to the employees outside the bargaining unit. In deciding to alter the practice with respect to the employees in the bargaining unit, the respondent breached the provisions of section 70 of *The Labour Relations Act* as modified by section 10 of *The Hospital Labour Disputes Arbitration Act*.

This decision alone would be sufficient to dispose of the case before us, but it is useful to make reference to *Spar Aerospace* as well.

17. In *Spar*, the practice (in simple terms) was to announce a global percentage for merit increases each year, which amount was left to the discretion of department managers to allocate as they saw fit amongst the members of their department. Once again, the employer took the position that it was not required to make the global amount available for distribution amongst those employees for whom a certificate had just been issued and notice to bargain served. In reviewing its own jurisprudence, the Board concluded:

16. ...The approach to be one of simply requiring the employer to conduct business as before.

...

23. The "business as before" approach does not mean that an employer cannot continue to manage its operation. What it does mean is simply that an employer must continue to run the operation according to the pattern established before the circumstances giving rise to the freeze have occurred, providing a clearly identifiable point of departure for bargaining and eliminating the chilling effect that a withdrawal of expected benefits would have upon the representation of the employees by a trade union. The right to manage is maintained, qualified only by the condition that the operation be managed as before. Such a condition, in our view, cannot be regarded as unduly onerous in light of the fact that it is management which is in the best position to know whether it is in fact carrying out business as before. This is an approach, moreover, that cuts both ways, in some cases preserving an entrenched employer right and in other cases preserving an established employee benefit.

24. ...[D]uring the period of the freeze, an interim legal regime is imposed by operation of section 70 as the parties move from the regime of the individual contract of employment to one governed by the terms of a collective agreement. This interim legal regime, in our view, should not place an employer in a legal straitjacket yet it should not at the same time lead to employees perceiving themselves as being penalized for engaging in collective bargaining. These two ends, in this Board's view, are best achieved by interpreting section 70 as requiring the parties to simply conduct "business as before".

The obvious concern of employers over this approach, when applied to wages, is amply set out in the dissenting opinion of Board Member Joyce:

6. In the present case, the complainant union is requiring the employer to raise the rates of pay following certification and before negotiations on compensation takes place. One of the most critical elements in the negotiations is that of compensation, whether in the form of wages or benefits, or in other words the total compensation "package". To require an employer to increase rates of pay while the union is legally entitled to bargain the total "package" obviously places the employer at a disadvantage in bargaining.

Recognizing this point, the majority noted:

29. While this complaint has been brought immediately prior to the commencement of negotiations, the Board does not regard it as being in any way vexatious. The timing of the merit increase may be awkward for the respondent, creating a higher monetary point of departure for negotiations, but these increases are a factor that must be taken into account at negotiations. Employees who have just received an increase as the result of the operation of section 70 should realize that there will be less money available for any wage increases in the collective agreement.

Or, as the present case demonstrates, there may be *no* additional money available after the general increase is implemented. The Board must conclude, however, that the respondent, in failing to implement the customary general increase for members of the bargaining unit at the same time as for other employees of the Town, was in violation of section 70 of the Act. The Board notes, parenthetically, that the unionized members of the police force have for some years been treated on a different basis than other employees of the Town. There is no evidence before the Board, however, of the manner in which the Town dealt with the members of the police bargaining-unit at the time of initial certification, and the extent to which this created a lawful and recognized exception to the Town's normal practice regarding the customary wage increase.

18. Turning to the other grounds of complaint, the respondent in its submissions placed considerable emphasis on the argument that, as a matter of law, the acceptance by the applicant's business representative of the terms and conditions of the Town's last offer nullifies any subsequent claim by the applicant that the said terms were discriminatory or punitive, in violation of the Act. In the Board's view, each case must on this point be judged according to

its own facts. There are, however, certain practical consequences of Mr. McMillan signing the memorandum which have an impact on this matter. It is somewhat unusual for a trade union's negotiator to sign a memorandum of settlement accepting the terms therein and agreeing to recommend the same to the membership, and then, several months later, allege that the terms proposed in that memorandum constituted a violation by the employer of the Act. At the very least, an explanation for signing the memorandum, now said to have embodied a violation of the Act, is required. As noted above, Mr. McMillan did in fact give evidence explaining his decision to sign the memorandum, on the basis of concluding that the Town's last offer was the best the employees were going to see, and that the best advice he could give them if they wanted their 8% increase, was to ratify the contract. The paradoxical conduct of Mr. Ferguson did not, of course, take place until after the memorandum was signed.

19. The Board accepts the *bona fides* of Mr. McMillan's explanation, and finds that his act of signing the memorandum at the time does not vitiate the present complaint. The fact remains, however, that the parties, certainly from the employer's point of view, had arrived at a tentative settlement, and the Board has noted in the past that it is not unusual for positions to harden following a failure to ratify. For example, in *Professional Institute of Canada*, [1978] OLRB Rep. Jan. 18, the Board observed at paragraph 13:

A failure to ratify thrusts the parties and in particular the negotiators into a most difficult situation. They have reached an understanding which has not met the test of ratification and in so doing have made commitments and raised expectations. They must return to the bargaining table amidst the frustration and distrust which often accompanies a rejection in attempting to negotiate a settlement. The duty to bargain in good faith and make every reasonable effort to conclude a collective agreement continues after a rejection and the Board when called upon to do so must assess the quality of the bargaining which takes place during this period. The Board however must be careful not to confuse frustration with bad faith or to draw unfavourable inferences from a fixed or inflexible response to rejection which is sometimes adopted in these circumstances.

20. On top of this, the applicant's conduct subsequent to the rejection of the contract did little to enhance either the process of negotiations, or its claim for relief from the Board. As the Board also noted in *Professional Institute of Canada*, at paragraph 14:

So too a failure to ratify does not signal a fresh start to the negotiations. The good faith effort of the parties which has resulted in a signed memorandum of settlement must form the "backdrop" to the bargaining which follows a failure to ratify.

While the applicant was perfectly entitled to return to the bargaining table and use its best efforts to obtain modifications to the areas which caused the rejection, the applicant went beyond this and used the failure to ratify as an opportunity to get out from under the "Management Rights" and "No Strike" clauses to which it had agreed (and which were not even discussed with the employees). This is the antithesis of good-faith bargaining, and provided justification for the position taken by the Town's advisor in his letter of March 19th.

21. There are, however, aspects of the respondent's conduct prior to this (apart from the

section 70 violation) which cause the Board concern. The section 70 violation itself may in this case be less “technical” in nature than reflective of a continuing attempt on the part of the respondent to discourage its employees from remaining with the applicant. Faced with a decision whether to withhold or grant the 8% increase to the members of the bargaining unit at the same time as the other employees of the Town, the Town elected to withhold the increase. This could have been expected to give (and *did* give) to these employees the appearance that they were being penalized for choosing to engage in collective bargaining, and provides a classic illustration of the concerns expressed by the Board in interpreting section 70 as it does. (See again *Spar Aerospace, supra*, paragraph 24.) As the weeks passed, the employees’ sensitivity over their discriminatory treatment became increasingly pronounced. The impact of withholding the increase from these employees would, of course, be compounded by the Town adopting a negotiating position which, until the conciliation meeting in October, declined to grant an increase on even a *retroactive* basis for the period during which collective bargaining was taking place. It is conceivable that the creation of retroactivity as an issue may have been no more than a bargaining ploy, designed to be traded upon at the “eleventh hour”, but no one from the Town’s negotiating team came forward to say that, and Mayor Crapper, when asked, could offer no explanation whatever for the Town’s position. All of these factors, combined with later events, raise a doubt whether the respondent ever did accept the lawful decision of its employees to bargain collectively, or was bargaining with a genuine intent to conclude a collective agreement.

22. In the latter regard, it is the actions of the management committee’s chairman, Mr. Ferguson, which causes the Board the greatest concern. It will be recalled that, immediately following the signing of the memorandum of settlement in Toronto on October 27th, Mr. Ferguson returned to Meaford ahead of the others and advised the employees in the bargaining unit that they would get the 8% increase whether they ratified the contract or not. Conceivably, this activity on the part of Mr. Ferguson may have been something other than a blatant attempt to thwart the consummation of a collective agreement. As noted, however, Mr. Ferguson was not called to offer any explanation of the incident. In the circumstances, the Board can only conclude that Mr. Ferguson’s evidence would not have been of assistance to the respondent. Given the terms of the memorandum of settlement, it may well be that the employees would have chosen to reject the efforts of their bargaining agent without any help from Mr. Ferguson. The Board notes the demonstrated tendency of these particular employees to “ride two horses” at the same time, in an effort to see which could produce the better result for them. Nonetheless, Mr. Ferguson’s intrusion into the ratification process represented a wholly unacceptable and unworthy interference in the administration of the trade union’s role as bargaining agent and constitutes a clear violation of both sections 56 and 59 of *The Labour Relations Act*.

23. But the major impact of Mr. Ferguson’s conduct is the insight it provides in retrospect of the respondent’s claim to have bargaining in good faith, in accordance with the requirements of section 14 of the Act. That section provides:

The parties shall meet within fifteen days from the giving of the notice or within such further period as the parties agree upon and they shall bargain in good faith and make every reasonable effort to make a collective agreement.

There is nothing unreasonable *per se* in an employer adopting a position in negotiating that its

unionized employees receive no larger a wage increase than its other employees. Nor is it unusual for an employer to insist that a first collective agreement be effective only from the date of settlement. The extent to which either or both of these bargaining goals can be realized depends upon the relative strength of the parties. The Board has made it clear on numerous occasions that it does not view its role under section 14 as that of an interest arbitrator between the parties, nor is it in the business of correcting an imbalance in bargaining strength. As the Board commented in *Ottawa Journal*, [1977] OLRB Rep. Nov. 748, at paragraph 12:

... The duty to bargain in good faith is administered by this Board in such a way as to improve and facilitate the practice and procedure of collective bargaining. This approach recognizes, however, that the results of collective bargaining are necessarily dictated by the relative economic strength of the bargaining parties. Although the Board should make every effort to restore a bargaining relationship and re-establish the dialogue between the parties to that relationship, it should not go so far as to redress any imbalance of bargaining power that might exist in a particular collective bargaining situation.

The recognition of the right of a party to pursue its own self-interest through “hard bargaining” was elaborated upon in *Radio Shack*, [1979] OLRB Rep. Dec. 1220, for example, at paragraph 66:

... The duty to recognize a trade union and to bargain in good faith does not require an employer to enter into any collective agreement proposed by a union. It is apparent from the structure and history of the legislation that the Legislature has assumed that the parties are best able to fashion the details of their relationship. The assumed strength of this approach is that labour and management are more likely to accept an employment relationship which they themselves create than one that is imposed on them. So too, their agreement is likely to be more accommodative of the economic and social demands that each faces. Accordingly, both parties are entitled to bargain hard for the agreement that they believe to be acceptable. This is so even if one of the parties has an overwhelming strength at the bargaining table and is able to achieve most or all of its needs. The exercise of such raw bargaining power *in good faith* does not offend the bargaining duty imposed by this Act. (emphasis added)

Again, this statement of principle was reiterated by the Board in *Fotomat Canada*, [1980] OLRB Rep. Oct. 1397, at paragraph 26, and once again with an important *caveat*:

... If bargaining power is defined as the ability to secure another’s agreement on one’s own terms, there is nothing in itself unlawful about either an employer or a trade union wanting its demands met and bargaining to achieve this end. The result may be perceived as unfair, unnecessary, and selfish, but the Ontario Labour Relations Board has not been given the role of interest arbitrator. See *Ottawa Journal*, [1977] OLRB Rep. June 309 at p. 323, para. 57. The Board has, however, said it will scrutinize the first contract relationships that come before it to sort out hard bargaining from unlawful conduct. *An employer cannot use his raw bargaining*

power for the objective of operating without a trade union.

(emphasis added)

24. The Board in fulfilling this scrutinizing function may be faced with the task of distinguishing what purports to be “hard” bargaining, from what is in reality “surface” bargaining; that is, a course of conduct giving the appearance of bargaining, but with no real intent of bargaining into a collective agreement. This, of course, represents a denial of the primary tenet of the duty to bargain in good faith, the duty to recognize the status of the trade union as exclusive bargaining agent (see *Fotomat Canada Limited*, *supra*, paragraph 25; *DeVilbiss (Canada) Limited*, [1976] OLRB Rep. March 49). As observed in the *Daily Times* case, [1978] OLRB Rep. July 604, at paragraph 15:

...The union claims that the company's wage offer and the inflexible position adopted by it on the issue of union security constitute a form of “surface bargaining”. “Surface bargaining” is a term which describes a going through the motions, or a preserving of the surface indications of bargaining without the intent of concluding a collective agreement. It constitutes a subtle but effective refusal to recognize the trade union. It is important, in the context of free collective bargaining, however, to draw the distinction between “surface bargaining” and hard bargaining. The parties to collective bargaining are expected to act in their individual self interest and in so doing are entitled to take firm positions which may be unacceptable to the other side. The Act allows for the use of economic sanctions to resolve these bargaining impasses. Consequently, the mere tendering of a proposal which is unacceptable or even “predictably unacceptable” is not sufficient, standing alone, to allow the Board to draw an inference of “surface bargaining”. This inference can only be drawn from the totality of the evidence including, but not restricted to, the adoption of an inflexible position on issues central to the negotiations. *It is only when the conduct of the parties on the whole demonstrates that one side has no intention of concluding a collective agreement, notwithstanding its preservation of the outward manifestations of bargaining, that a finding of “surface” bargaining can be made.* (emphasis added)

See also *Goldcraft Printers Ltd.*, [1980] OLRB Rep. April 448, at paragraph 21.

25. In the present case, it would be difficult to infer an attempt to avoid a collective agreement simply from the conduct of the Town prior to October 27, 1980 (notwithstanding the violation of section 70 of the Act). The Town's offer was clearly an embarrassment to the applicant trade union, but one which appeared simply to reflect the bargaining strengths of the parties. But if the Town had in fact been bargaining with the intention of making a collective agreement, albeit on its own terms, why would the chairman of the Town's negotiating committee, immediately following the acceptance of these terms by the applicant, return to Meaford and attempt to scuttle the contract through employee rejection? In the absence of any other credible explanation, the Board is forced to conclude that the Town had felt all along that its position on the extent and timing of the wage increase would be sufficient to avoid a collective agreement with the applicant. Or, as the Board put it in *Radio Shack*, *supra*, at

paragraph 88, the respondent, in other words, apparently believed that “hard bargaining” itself would be sufficient to preclude the execution of a collective agreement. This clearly is a violation of section 14. When the applicant accepted the respondent’s offer, Mr. Ferguson apparently concluded that the only way to head off a collective agreement was to get to the employees and discourage ratification. It should be mentioned that Mayor Crapper in his evidence stated that Mr. Ferguson had no authority from him to speak to any employees about the settlement on October 27th. In view of the position of Mr. Ferguson, however, as both Reeve of the Town and Chairman of its negotiating committee, as well as the “directing mind” of the employer’s bargaining position, it cannot be seriously contended that this dissociation by the Mayor constitutes any form of a defence for the Town.

26. This scenario also places in a more suspicious light the respondent’s interest in the constitutional authority of the applicant to sign a collective agreement without ratification. While the applicant’s representatives appear to have confused the situation with their responses to Town counsel at the meeting of January 12th, it is curious that the respondent, even in its letter of January 5th, was taking the apparently unprovoked position that: “On our reading of your constitution, ratification by the membership is necessary and it would appear therefore that your Union has no jurisdiction to sign this agreement until ratification is achieved”. It appears that subsequently confusion arose over the fact that the fourth member of the Department was still to be polled by the others, and the parties began speaking at cross-purposes when discussing the question of ratification. It is difficult to draw clear inferences with respect to the intentions of either party at that stage. Whatever lay behind the confusion, and without ruling on whether an employer would ever be entitled to demand proof of the authority of a certified bargaining agent to sign a collective agreement, the Board notes that the respondent by the time of its letter of March 19, 1981, knew clearly that the applicant had no intention of signing a collective agreement in the absence of ratification, and that the respondent indicated it was prepared to meet and bargain on the true areas of employee discontent, once it was satisfied that the contract had in fact been voted on and rejected. At least as of that point then, the issue of the applicant’s authority to sign a collective agreement ceased to be a factor in these negotiations.

27. The violation by the respondent of section 14, evidenced earlier, remains however, and it is the responsibility of the Board to fashion an appropriate remedy. In this regard, counsel for the applicant seeks an order that:

The respondent bargain in good faith and make every reasonable effort to make a collective agreement and in particular:

- (i) bargain a wage rate schedule reflecting a percentage wage rate increase not less than the percentage wage rate increase customarily implemented or to be implemented with respect to non-bargaining unit employees for the period January 1st, 1981 to December 31st, 1981; and
- (ii) bargain a duration provision that does not have the effect of locking the bargaining unit employees into a percentage wage rate increase equal to or less than the percentage wage rate increase customarily implemented or to be implemented with respect to non-bargaining unit employees operative for the time period January 1st, 1981 to

December 31st, 1981, for any period of time beyond December 31st, 1981.

28. The applicant's request for relief in effect seeks to ensure that the members of the bargaining unit will be treated at least as favourably as non-union employees with respect to both the size and the timing of wage increases. To that extent, it is asking the Board to intervene in the substantive results of bargaining in a way that the Board has often expressed its reluctance to do. See, for example, *Wilson Automotive*, [1980] OLRB Rep. July 1136, paragraph 7, ff. What makes this case even more difficult is that there is nothing in the bargaining position of the respondent which on its surface, and standing alone, is either unusual or surprising, given the lack of bargaining clout of the applicant. Had the evidence supported a finding of hard bargaining and nothing more, the Board would have no cause to intervene. But once again, the Board's principle of voluntarism assumes lawful motives. As the Board noted in *Wilson Automotive*, *supra*:

As a general proposition, a party is free to take whatever position best satisfies its self interest *providing it maintains the intention of concluding a collective agreement.*

(emphasis added)

29. As the Board has discussed, the conduct of Mr. Ferguson following the signing of the memorandum of settlement colours everything that had gone before (cf. *Fotomat Canada Ltd.*, [1980] OLRB Rep. Oct. 1397). The Board has concluded that the respondent in arriving at its October 27th position was engaging in surface bargaining and was in fundamental violation of the duty imposed by section 14 of the Act. Rather than seeking to enter into a collective agreement on its own terms, the respondent's proposals must be taken to have been designed, through discrimination and intimidation, to have caused the employees in the unit to abandon the applicant as their bargaining agent, in violation of both sections 58 and 61 of the Act as well. Those sections provide:

58. No employer, employers' organization or person acting on behalf of an employers' organization,

- (a) shall refuse to employ or to continue to employ a person, or discriminate against a person in regard to employment or any term or condition of employment because the person was or is a member of a trade union or was or is exercising any other rights under this Act;
- (b) shall impose any condition in a contract of employment or propose the imposition of any condition in a contract of employment that seeks to restrain an employee or a person seeking employment from becoming a member of a trade union or exercising any other rights under this Act; or
- (c) shall seek by threat of dismissal, or by any other kind of threat, or by the imposition of a pecuniary or other penalty, or by any other means to compel an employee to become or refrain from becoming or to continue to be or to cease to be a member or officer or

representative of a trade union or to cease to exercise any other rights under this Act.

61. No person, trade union or employers' organization shall seek by intimidation or coercion to compel any person to become or refrain from becoming or to continue to be or to cease to be a member of a trade union or of an employers' organization or to refrain from exercising any other rights under this Act or from performing any obligations under this Act.

30. The violations of the Act herein lie in the insistence on monetary proposals which discriminate against members of the bargaining unit not in their amount, but in the timing of their effective date. The purpose of this position having been found to be unlawful, the respondent will be directed to move off it. As the Board observed in *Radio Shack*, [1979] OLRB Rep. Dec. 1220, in paragraph 117:

. . . Once having breached the Act, offending parties should not be surprised to find that to establish a bona fides intent they may be required to act temporarily in ways that the Board does not demand of others.

The Board notes as well that the respondent has seen fit in the past to grant collective agreements on a January 1st to December 31st basis in dealing with the unionized members of its police force. The respondent's present offer to the applicant being an 8% increase from October 1980 to October 1981, and, in effect, retroactivity to January 1, 1980, is unacceptable, in that it leaves the employees in the bargaining unit with the uncertainty of having to again bargain for retroactivity to achieve parity in succeeding contracts, as well as the dissatisfaction in any event of having to wait longer for their increase than other employees. The respondent, by its demonstrated unlawful purpose in these negotiations, has disintitiled itself from maintaining that position. The extent of the Board's intervention will be to direct the respondent to eliminate the discriminatory aspects of its financial offer. The final form which any proposed collective agreement for this bargaining unit is to take, however, will, subject only to the Board's direction, remain a matter for bargaining between the parties.

31. The applicant claims damages as well for its negotiating and legal costs resulting from the improper actions of the respondent. The Board in *Radio Shack*, [1979] OLRB Rep. Dec. 1220, has set out its reasons for resisting awards of legal costs on the matters coming before it, and the Board does not consider the present case an appropriate one to venture outside those principles. On the question of negotiating costs, the Board notes that the time taken to arrive at a final monetary position from the Town was not excessive, and that the bargaining process beyond that point (October 27th, 1980) was distorted by the applicant's own attempts to renege without justification on some of the language items contained in the memorandum of settlement. On the whole, the Board views the applicant's abnormal negotiating costs, if any, as attributable more to the applicant's own lack of bargaining strength and its attempts to renege on language items following rejection of the contract, than on any of the violations of the Act found to have been committed by the respondent. It must be borne in mind that the applicant at no time after October 27th has been seeking an opportunity to enter into a collective agreement on the terms set out in the memorandum of settlement. To the extent that Mr. Ferguson's intervention may have caused a rejection by the employees of the contract, the applicant has not suggested it is displeased with that result. Rather, it has been seeking a further opportunity to bargain. Hopefully with the litigation now complete,

the parties can return more fruitfully to the point they were at when they met with the Board's officer on April 30th, when they almost sat down to bargain.

32. The Board accordingly directs:

1. that the parties meet to continue bargaining at the earliest possible opportunity, and that they bargain in good faith and make every reasonable effort to make a collective agreement;
2. that the respondent, upon the resumption of bargaining, immediately table a monetary position which will not discriminate against the members of the bargaining unit, in comparison with the non-unionized employees of the respondent, either in terms of the amount of the financial package offered, or the effective date of any increases thereunder;
3. that the respondent forthwith pay to the applicant for distribution to the members of the bargaining unit damages for the violation of section 70 of the Act, being interest in accordance with the Board's policy set out in Practice Note No. 13 on the monies wrongfully withheld from the date the non-unionized employees of the Town received their annual increase to the date the said increase was implemented for the members of the bargaining unit;
4. that the respondent cease and desist from interfering in the administration of the applicant in its role as exclusive bargaining agent for employees of the respondent, and from seeking in any way to bargain directly with any or all of those employees; and
5. that the respondent post a notice, signed by the Mayor of the Town and by the chairman of the Town's negotiating committee, in the form attached as Appendix A hereto, for sixty consecutive working days, in an area or areas of the Town's premises where such notice is likely to come to the attention of the members of the applicant's bargaining unit.

DECISION OF BOARD MEMBER, C. G. BOURNE;

1. I concur in the findings of the panel, with the exception of the section 70 complaint, which deals with the Town's withholding of the 8% retroactive pay increase from the Works Department.

2. The majority finding in this regard follows Board practice, with which I cannot agree. Free collective bargaining calls for negotiation of all matters in dispute, and any gratuitous augmentation of wages simply establishes a floor which distorts the entire course of subsequent negotiations. This principle has been already expressed by Board Member Joyce, in *Spar Aerospace Products Limited*, [1978] OLRB Rep. Sept. 859, cited in the majority report.

NOTICE TO EMPLOYEES

Posted by Order of the Ontario Labour Relations Board

WE HAVE POSTED THIS NOTICE IN COMPLIANCE WITH AN ORDER OF THE ONTARIO LABOUR RELATIONS BOARD, FOLLOWING A SERIES OF HEARINGS BEFORE THE BOARD. THE ONTARIO LABOUR RELATIONS BOARD FOUND THAT THE TOWN, IN DEALING WITH THE INTERNATIONAL UNION OF OPERATING ENGINEERS AND THE WORKS DEPARTMENT EMPLOYEES WHICH IT REPRESENTS, HAS COMMITTED UNFAIR LABOUR PRACTICES IN VIOLATION OF SECTIONS 14, 56, 58, 59, 61 AND 70 OF THE LABOUR RELATIONS ACT.

IN ACCORDANCE WITH THE BOARD'S ORDER WE WILL:

1. RETURN TO THE BARGAINING TABLE FORTHWITH AND MAKE EVERY REASONABLE EFFORT TO MAKE A COLLECTIVE AGREEMENT;
2. CEASE AND DESIST FROM PROPOSING TERMS AND CONDITIONS OF EMPLOYMENT FOR THE EMPLOYEES OF THE WORKS DEPARTMENT WHICH DISCRIMINATE AGAINST THEM IN COMPARISON WITH THE EMPLOYEES OF THE TOWN NOT REPRESENTED BY A TRADE UNION;
3. FORTHWITH PAY TO THE INTERNATIONAL UNION OF OPERATING ENGINEERS FOR DISTRIBUTION TO THE EMPLOYEES OF THE WORKS DEPARTMENT DAMAGES FOR THE PERIOD OF TIME THAT THE 1980 GENERAL INCREASE WAS UNLAWFULLY WITHHELD FROM THESE EMPLOYEES; AND
4. CEASE AND DESIST FROM INTERFERING IN THE ADMINISTRATION OF THE INTERNATIONAL UNION OF OPERATING ENGINEERS IN ITS ROLE AS EXCLUSIVE BARGAINING AGENT FOR THE EMPLOYEES IN THE WORKS DEPARTMENT, AND FROM SEEKING IN ANY WAY TO BARGAIN DIRECTLY WITH THE EMPLOYEES WHICH THE TRADE UNION REPRESENTS.

THE CORPORATION OF THE TOWN OF MEAFORD

PER: _____

MAYOR

CHAIRMAN, BARGAINING COMMITTEE

This is an official notice of the Board and must not be removed or defaced.

This notice must remain posted for 60 consecutive working days.

0593-81-JD United Association of Journeymen & Apprentices of the Plumbing & Pipe Fitting Industry of the United States and Canada, Local 527, Complainant, v. **Dominion Bridge Company Ltd.** and International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Local 128, Respondent, v. Electrical Power Systems Construction Association, Intervener.

Jurisdictional Dispute – Practice and Procedure – Two unions having arrangement to resolve work assignment disputes – Whether Board deferring to private arrangement where employer not party to it – Whether collective agreements require referral of dispute to IJDB

BEFORE: Ian Springate, Vice-Chairman, and Board Members H. J. F. Ade and C. A. Ballentine.

APPEARANCES: *Alex J. Ahee and Jack Porter for the complainant; R. A. Werry and R. Speight for Dominion Bridge Company Ltd.; Harold F. Caley and Matt Bakker for the International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Local 128; A. W. Bell for the intervener.*

DECISION OF THE BOARD; September 22, 1981

1. The International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Local 128 is hereby added as a respondent to these proceedings and the Electrical Power Systems Construction Association is added as an intervener.
2. This is a complaint under section 81 of *The Labour Relations Act* in which it is requested that the Board issue a direction with respect to the assignment of certain work.
3. The respondent, Dominion Bridge Company Ltd. ("Dominion Bridge"), has let certain work to employees represented by Local 128 of the International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers ("the Boilermakers"). Dominion Bridge and the Boilermakers are both bound by the terms of a collective agreement between the Ontario Allied Construction Trades Council and the Electrical Power Systems Construction Association ("EPSCA"). The complainant, Local 527 of the United Association of Journeymen & Apprentices of the Plumbing & Pipe Fitting Industry of the United States and Canada ("the United Association"), requests a direction that the work in question be assigned to its members. The United Association and Dominion Bridge are bound by the terms of a collective agreement entered into between the United Association and EPSCA.
4. At the hearing, counsel for the Boilermakers contended that the Board should not entertain this complaint due to the provisions of sections 81(13) and 81(14) of *The Labour Relations Act*, which provide as follows:

81-(13) Where a trade union or a council of trade unions and an employer or an employers' organization have made an arrangement to resolve any differences between them arising from the assignment of work, the Board may, upon such terms and conditions as it may fix,

postpone inquiring into a complaint under this section until the difference has been dealt with in accordance with such arrangement.

(14) The Board shall not inquire into a complaint made by a trade union, council of trade unions, employer or employers' organization that has entered into a collective agreement that contains a provision requiring the reference of any difference between them arising out of work assignment to a tribunal mutually selected by them with respect to any difference as to work assignment that can be resolved under the collective agreement, and such trade union, council of trade unions, employer or employers' organization shall do or abstain from doing anything required of it by the decision of such tribunal.

5. Counsel for the Boilermakers contended that the Board should defer consideration of the complaint under section 81(13) in that the United Association had not followed the procedure for settling jurisdictional disputes set out in an agreement entered into between the international parent bodies of the two unions. Counsel for the United Association contended that the procedure had in fact been followed and subsequent to the hearing he filed certain material which, on its face, tends to support this contention. Whatever the truth of the matter, we are satisfied that we should not postpone inquiring into the complaint due to the agreement between the two international unions. Section 81(13) of the Act indicates that the Board should defer consideration of a section 81 complaint so as to allow a work assignment dispute to be settled in accordance with a private arrangement only where the employer is party to the arrangement. There is nothing before us to indicate that Dominion Bridge is party to the arrangement between the two international unions, and accordingly we decline to postpone consideration of the complaint on this basis.

6. Counsel for the Boilermakers further contended that the Board should not inquire into the complaint in that both of the relevant collective agreements contain a provision requiring the reference of work assignment disputes to the Impartial Jurisdictional Disputes Board for the Construction Industry ("the IJDB"). The relevant articles in the collective agreement binding on Dominion Bridge and the Boilermakers are as follows:

10.3 In the event that a jurisdictional dispute arises over a work assignment, the Employer will make an assignment for the work to be done. If any Union or Unions disagree with such a work assignment, the parties will settle such jurisdictional dispute in accordance with procedure as outlined by the Impartial Jurisdictional Disputes Board for the Construction Industry of the Building Trades Department, AFL—CIO.

10.4 In the event that a jurisdictional dispute cannot be settled on a local basis by the Unions involved, it shall be submitted to the International Unions involved for settlement without permitting it to interfere in any way with the progress of the work at any time. In the event the dispute is not settled by the International Unions involved, it shall then be submitted to the Impartial Jurisdictional Disputes Board for the Construction Industry for resolution. Those Unions and Employers involved shall advise the Council and EPSCA respectively, in writing, of an intent

to submit a jurisdictional dispute to the impartial Jurisdictional Disputes Board and will identify the work in question. The decision of the Impartial Jurisdictional Disputes Board will be final and binding to the parties to this Agreement.

10.5 EPSCA shall have direct recourse to the Impartial Jurisdictional Disputes Board for the Construction Industry when the Impartial Jurisdictional Disputes Board for the Construction Industry has under its consideration a dispute involving the assignment of work being done by employees who are covered by this Agreement.

10.6 In the event that the Impartial Jurisdictional Disputes Board for the Construction Industry fails to render a decision within sixty (60) days of the disputed assignment, EPSCA shall have recourse to the Ontario Labour Relations Board for a decision.

The relevant articles in the collective agreement binding on Dominion Bridge and Local 527 of the United Association are as follows:

6.2 In recognition of the Union's jurisdictional claim, it is understood that the assignment of work and the settlement of jurisdictional disputes with other Building Trades organizations shall be adjusted in accordance with the procedure established by the Impartial Jurisdictional Disputes Board, or any successor agency of the Building and Construction Trades Department. When a jurisdictional dispute exists between unions and upon requests by the United Association, the Employer shall furnish the U.A. Director of Canadian Affairs a signed letter from a duly authorized official of the company on Employer stationery, stating whether or not the Union was employed on specific types of work on a given project. The Employer agrees to consider evidence of established practices within the industry when making jurisdictional assignments.

6.4 The International Representative of the Union will advise the Association in writing of his intent to submit a jurisdictional dispute to the Impartial Jurisdictional Disputes Board and will identify in detail the work in question. The decision of the Impartial Jurisdictional Disputes Board will be final and binding to the parties to this Agreement.

6.6 In the event that the Impartial Jurisdictional Disputes Board for the Construction Industry fails to render a decision within sixty (60) days of the disputed assignment, the Association and the Union shall have recourse to the Ontario Labour Relations Board for a decision.

7. Counsel for the United Association contended that the Board should not require that the work assignment dispute in issue be submitted to the IJDB in that it was his understanding that the IJDB had ceased to operate, although he conceded that he had no concrete evidence to support this assertion. Counsel for the Boilermakers did not accept the contention that the IJDB had ceased to operate, and took the position that the United Association was required to at least attempt to bring the matter before the IJDB.

8. We are well aware of the fact that the IJDB has had a somewhat checkered history in recent years. However, we have no evidence before us which would establish that the body has actually ceased to operate. In that the parties to this dispute voluntarily agreed in their collective agreements to refer any jurisdictional disputes to the IJDB, in our view, they ought to be required to at least try to have this dispute dealt with by that body. In the event that the IJDB is no longer operational, or if it fails to render a timely decision, then section 81(14) might not apply in which case the Board would have jurisdiction to entertain this complaint. See: *Ontario Hydro*, [1979] OLRB Rep. Feb. 124. In these circumstances, the Board postpones entering into the inquiry of this complaint pursuant to section 81(13) of *The Labour Relations Act* so as to allow this matter to be referred to the Impartial Jurisdictional Disputes Board for the Construction Industry.

0468-81-U Dr. Bidhu B. P. Sinha, Complainant, v.
Fanshawe College of Applied Arts and Technology,
 Respondent, v. Ontario Public Service Employees Union, Intervener.

Evidence – Practice and Procedure – Complaint of unfair labour practices in contravention of *Colleges Collective Bargaining Act* – Union’s complaint on behalf of grievor dismissed by Board – Grievor filing subsequent complaint on own behalf making new allegations – Whether *Res Judicata*

BEFORE: Ian Springate, Vice-Chairman, and Board Members O. Huges and J. Wilson.

APPEARANCES: Dr. Bidhu B. P. Sinha for the complainant; W. J. Hayter, H. W. Collard and P. T. Myers for the respondent; Richard Nabi for the intervener.

DECISION OF THE BOARD; September 11, 1981

1. This is a complaint under section 78 of *The Colleges Collective Bargaining Act*, 1975, alleging that Dr. B. Sinha has been dealt with by Fanshawe College of Applied Arts and Technology (the “College”) contrary to several provisions of the Act. Initially, the complaint alleged violations of sections 52(1), 66 and 76(2) of the Act. At the hearing the Board permitted Dr. Sinha to also allege that the college had violated sections 76(3) and 81(1). During the hearing into this matter Dr. Sinha was given an opportunity to put forward all of the facts upon which he intended to rely in support of his complaint. At the conclusion of the hearing the Board orally dismissed the complaint and gave brief reasons for doing so. What follows are more extensive reasons for the Board’s ruling.

2. Dr. Sinha commenced to teach for the college on a full-time basis in the fall of 1978. In this position he was covered by a collective agreement binding on the college entered into between the Ontario Council of Regents for Colleges of Applied Arts and Technology and the intervener trade union (“OPSEU”). On March 28, 1979, Dr. Sinha, who was still a probationary employee under the collective agreement, was advised that his employment with the college would be terminated effective June 30, 1979, and that he was being released from all duties as of April 30, 1979. The position of the college is that the decision to terminate Dr.

Sinha was based solely on factors relevant to his performance as a teacher. On April 22, 1980, OPSEU filed a complaint on behalf of Dr. Sinha under section 78 of the Act (File No. 0139-80-U) alleging as follows:

“On or about March 28, 1979 the grievor was dealt with by J. A. Colvin, President of Fanshawe College and W. Collard, Chairman of the Mathematics and Science Division of the respondent contrary to the provisions of section 76, of the Colleges Collective Bargaining Act in that they did on their own behalf or on behalf of the respondent terminate the employment of Dr. Sinha in response to Dr. Sinha initiating action under the Grievance Procedure of the Collective Agreement. Dr. Sinha was objecting to a memo of March 8, 1979 from W. Collard.”

The complaint further requested that the Board order the reinstatement of Dr. Sinha with compensation.

3. A hearing was held into the merits of this earlier complaint before a differently constituted panel of the Board. On January 20, 1981, the Board issued a decision in which it concluded that Dr. Sinha's action in pursuing his rights under the collective agreement had not been a factor in his termination, and accordingly it dismissed the complaint.

4. The instant complaint was filed on May 23, 1981. Like its predecessor, the present complaint alleges that Dr. Sinha's termination was contrary to *The Colleges Collective Bargaining Act, 1975*, although this time it relies on a number of different provisions of the Act. As already noted, the Board permitted Dr. Sinha at the hearing to widen the scope of his complaint against the college. Dr. Sinha also sought at the hearing to amend his complaint to allege a violation of sections 52(1), 76(3), 77 and 81(2) of the Act on the part of OPSEU and to request an order of compensation against the union. Dr. Sinha indicated that if such was necessary, he was willing to have the Board add OPSEU as a respondent to the complaint. The representative of OPSEU objected strenuously to having to deal on such short notice with any allegations that the union violated the Act. In the interests of basic fairness to OPSEU, the Board ruled that it would not allow the complaint to be amended to alleged a violation of the Act on the part of OPSEU or to seek compensation from OPSEU.

5. It was the contention of counsel for the college that the subject matter of the instant complaint is *res judicata* in that it had been dealt with in the earlier proceedings. The position of the college is that the reasons for Dr. Sinha's termination were fully canvassed in the earlier proceedings and that it would be improper to require the college to relitigate the issue simply because Dr. Sinha now desires to put before the Board additional facts and submissions which could have been presented in the earlier proceedings. The Board's practice is, in the appropriate case, to apply a doctrine analogous to *res judicata* to prevent the relitigation of issues. The Board discussed the principles involved in the following excerpt from the *Arnold Markets Limited* case 62 CLLC ¶16,221:

“This case again raises the question as to the evidentiary effect of a previous decision of the Board when relied on as proof of matters in issue in another proceeding before it. The common law courts deal with this question under the rules of *res judicata* or estoppel. These rules, of course, are designed to bar relitigation of adjudicated issues on the basis

that as a matter of public policy there should be an end to litigation and that a party should not be twice vexed for the same cause or again required to prove a matter already adjudicated in his favour. The general rule at common law is that an existing final judgment rendered upon the merits by a court of competent jurisdiction is binding upon and conclusive evidence for or against the parties and their privies in any subsequent actions involving any matters actually decided and which might have been litigated in respect of those matters in the first action. (See the authorities referred to in *Wright Assemblies Limited*, Board file 9661-61-U and *Phipson on Evidence*, 9th ed. pp. 427-444). The conclusiveness of the judgment includes not only the findings but also the grounds of the decision where these can be clearly discovered from the judgment itself (see *Phipson, ibid.*, p. 427).

It seems obvious that as a general rule, once a fact or question has been put in issue and directly adjudicated upon in the proceeding before the Board, such adjudication should constitute a final determination of the matter between the same parties and conclusive evidence for or against them in any other proceeding before the Board which involves the same question or fact. It is our opinion that the Board ought, as a general rule, to apply a principle analogous to that of *res judicata* or estoppel with the result that it must accept an existing decision made by it on the merits as conclusive evidence for or against the parties or their privies in any subsequent proceeding brought before it by the same parties and involving the same questions or facts decided by it in the first decision (see *Halsbury's Laws of England*, 3rd ed. vol. 15, pp. 212, 213)."

6. Dr. Sinha contended that the subject matter of the instant complaint is not *res judicata* in that whereas OPSEU had been the complainant in the earlier proceedings here he was bringing the complaint on his own behalf. Dr. Sinha acknowledged that he had asked OPSEU to bring the earlier complaint on his behalf and that he had testified in support of the complaint at the hearing but, he contended, during the hearing the union had acted in collusion with the college. In our view, the fact that Dr. Sinha is bringing this complaint on his own behalf does not take the matter out of the principle of *res judicata*. As noted in the above excerpt from the *Arnold Markets* case, *res judicata* applies to bind both the parties to an earlier proceeding as well as their privies. Dr. Sinha was clearly privy to OPSEU in the original complaint, and indeed OPSEU filed the complaint for the benefit, and at the request of, Dr. Sinha. Further, whatever recourse Dr. Sinha may have against OPSEU, his dissatisfaction with the conduct of the earlier proceedings is not, in itself, sufficient to require the college to defend itself against the same or related allegations a second time around.

7. Dr. Sinha also contended that *res judicata* does not apply in this case because the Board in the earlier proceedings had concentrated on the issue of whether a memo written by Dr. Sinha on March 15, 1979 had triggered his discharge and the Board did not deal with certain other matters relating to his discharge and treatment by the college. Dr. Sinha further indicated that he now desired to bring forth evidence relating to a longer time period than that which had been raised during the earlier proceedings. We are satisfied, however, that it is not now open to Dr. Sinha to raise matters which were or reasonably could have been, advanced in the earlier proceedings. In this regard we would refer to the following statements of Wigram V.C. in *Henderson v. Henderson* 67 E.R. 313:

“... Where a given matter becomes the subject of litigation, and of adjudication by a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matters which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of *res judicata* applies, except in special case, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of the litigation and which the parties, exercising diligence, might have brought forward at the time.”

8. Having regard to our reasoning set out above we are satisfied that the Board should apply a principle analogous to that of *res judicata* and not permit Dr. Sinha to relitigate the issue of whether his discharge was in violation of section 76(2) of the Act. At the hearing Dr. Sinha amended his complaint to also allege a violation of section 73(3) of the Act. This section prohibits the use of intimidation or coercion to compel a person from exercising rights under the Act. In his submissions Dr. Sinha did not expressly indicate how he felt the college had violated this section. However, it is clear that this section could have been pleaded in the earlier proceedings and accordingly it cannot now be raised by way of a fresh complaint.

9. In his current complaint Dr. Sinha contends that the college violated section 81(1) of the Act, a contention not raised in the earlier proceedings. Section 81(1) provides inter alia, that a college shall not refuse to continue to employ or discriminate against a person because of a belief that that person may testify in a proceeding under the Act. Dr. Sinha took the position that his discharge was motivated in part by a concern on the part of certain officials of the college that at some point in the future he might file a complaint and testify against the college. In our view, this type of allegation could have been raised in the earlier proceedings when the Board dealt with the issue of whether Dr. Sinha's discharge had been contrary to the Act, and accordingly are satisfied that the Board should not now deal with this allegation.

10. The instant complaint also alleges that the college violated section 66 of the Act. Section 66 declares that every person is free to join an employee organization of his own choice and to participate in its lawful activities. This section is essentially a declaration of rights and does not create an offense. Effect is given to this declaration by the specific prohibitions and offenses contained in other sections of the Act. It follows that the college could not have violated section 66. In this regard see: *Mrs. Deborah Brown, Mr. Stephen Lewis*, [1976] OLRB Rep. Feb. 4.

11. The instant complaint alleges that the college violated section 52(1) of the Act, an allegation also not contained in the earlier proceedings. Section 52(1) provides inter alia that a collective agreement is binding on a college. It was Dr. Sinha's contention that on the basis of this section the Board can deal with any alleged breach of the collective agreement in much the same way as can a board of arbitration. Because of this, contended Dr. Sinha, the Board can deal with his discharge insofar as it may have been in violation of the collective agreement, notwithstanding the fact that article 9.06 of the agreement provides that the dismissal of a probationary employee, such as Dr. Sinha, shall not be the subject matter of a grievance.

12. Unlike Dr. Sinha, we do not interpret section 52(1) as giving the Board the power to hear all issues involving the alleged violation of a collective agreement. Section 47 of the Act makes it clear that alleged violations of a collective agreement are matters to be dealt with at arbitration. If the legislature intended this Board to act as an arbitration board in matters relating to community colleges, it would have expressly given it the authority to do so, as indeed it did under section 112a of *The Labour Relations Act* with respect to grievances arising out of the construction industry.

13. We would note at this point that the primary issue Dr. Sinha sought to have the Board determine under the collective agreement was whether or not his discharge had been in violation of article 24.01 which provides that in accordance with the provisions of *The Ontario Human Rights Code*, no employee shall be discriminated against by reason of race, creed, colour, age, sex, marital status, nationality, ancestry or place of origin. We would note in this regard that if Dr. Sinha feels that he had been discriminated against contrary to the terms of *The Ontario Human Rights Code* he can make a complaint to the tribunal specifically established under the Code to deal with such matters, namely The Ontario Human Rights Commission.

14. It was for the reasons set out above that the Board orally dismissed this complaint at the hearing.

0664-81-M Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftsmen and International Union of Bricklayers and Allied Craftsmen, Local 23, Applicants, v. **Fred Jantz Masonry Construction Company Limited**, Respondent.

Collective Agreement – Construction Industry – Section 112a – Parties having short form agreement incorporating province-wide agreement between Employer Association and union – Respondent employer not member of Employer Association – Union failing to seek new short form agreement after expiry of old – Whether employer still bound by province-wide agreement

BEFORE: N. B. Satterfield, Vice-Chairman and Board Members J. A. Ronson and C. A. Ballentine.

APPEARANCES: S. B. D. Wahl, D. DeMonte and H. Kroening for the applicants; Mark Contini and Fred Jantz for the respondent.

DECISION OF THE BOARD; September 29, 1981

1. The applicants have referred a grievance concerning the interpretation, application, administration or alleged violation of a collective agreement to the Board for final and binding arbitration pursuant to section 112a of *The Labour Relations Act*.

2. The applicant's grievance contains allegations that the respondent has violated

certain specific articles of a collective agreement, which the applicant claims is binding on the respondent, and which deal with such matters as union security, wages and welfare benefits, etc. The grievance may be characterized as alleging that the respondent is ignoring the collective agreement altogether.

3. The respondent neither replied to the grievance when it was served on it by the union nor filed a reply with the Board as required by section 104(1) of the Board's Rules of Procedure. At the hearing into the referral, counsel for the respondent disputed the Board's jurisdiction on grounds that the applicants have no collective agreement with the respondent, or in the alternative, if there was a collective agreement, it applied only to the industrial, commercial and institutional sector of the construction industry. Counsel contended as well that, if ever the applicants have held bargaining rights for employees of the respondent in the past, these rights were improperly obtained and in any event had been abandoned. Finally, counsel advised the Board that it would be arguing that the grievance was barred by operation of the doctrines of *laches* and *estoppel*. While counsel for the applicants admitted that the challenge to the Board's jurisdiction was procedurally proper, he contended that, since the respondent had not filed a reply to the referral, the Board should apply section 47(4) of its Rules of Procedure and refuse the respondent's assertion that bargaining rights were improperly obtained. The Board ruled that it would hear evidence and argument on the threshold issue of whether the respondent was a party to, or bound by, a collective agreement with the applicants or to which the applicants were bound and, if need arose, would deal with other issues in the course of determining the threshold issue.

4. In the course of the proceedings, respondent counsel advised the Board that he would not pursue the argument that the applicants had abandoned their bargaining rights. The evidence before the Board not only would not support a finding of abandonment, it does not support the claim that the applicants obtained bargaining rights for employees of the respondent improperly and does not provide any basis for operation of the doctrines of *laches* and *estoppel*. Therefore the issues before the Board are whether the respondent and the applicants are bound to a collective agreement thus giving the Board jurisdiction to hear the applicants' grievance and determining the respondent's liability, if any.

5. The applicants are relying on a collective agreement entitled Provincial Agreement for Ontario Bricklayers, Stone Masons And Plasterers, effective May 1, 1980 to April 30, 1982, between the International Union of Bricklayers and Allied Craftsmen and the Ontario Provincial Conference of the International Union of Bricklayers and [Allied] Craftsmen and The Masonry Industry Employers Council of Ontario. The parties to this agreement are bargaining agents which have been designated by the Minister of Labour pursuant to section 127(1) of the Act. This agreement is the successor to one between the same parties which was in effect from May 1, 1978 to April 30, 1980, which, in turn, was the successor agreement of two earlier ones between the Ontario Provincial Conference of the International Union of Bricklayers and [Allied] Craftsmen ("the Provincial Conference") and The Masonry Industry Employers Council of Ontario ("MIECO"). They were in effect from May 24, 1976 to April 30, 1978 and May 1, 1973 to April 30, 1976 respectively. At the time of the May 1, 1973 agreement, the Provincial Conference was known as the Ontario Provincial Conference of the Bricklayers, Masons & Plasterers International Union of America. The evidence before the Board establishes clearly that the current collective agreement and its immediate predecessor agreement not only are provincial agreements within the meaning of clause *e* of section 125 of the Act, but that they are agreements which, at least within the geographic jurisdiction of the

International Union of Bricklayers and Allied Craftsmen, Local 23, also pertain to all sectors of the construction industry, as did the two earlier agreements between the Provincial Conference and MIECO.

6. On August 27, 1973, the respondent and the Provincial Conference signed a collective agreement of a type commonly referred to in the construction industry as a shortform agreement. This agreement did two things. First, the agreement bound the respondent and the Provincial Conference to the terms and conditions of the collective agreement between the Provincial Conference and MIECO then in effect, that is the collective agreement effective May 1, 1973 to April 30, 1976. Second, it granted voluntary recognition to the Provincial Conference as bargaining agent for all of the respondent's employees who would fall within the bargaining unit described in that collective agreement in the following terms: "... Bricklayers, Stonemasons and Plasterers, their respective Apprentices, Improvers and Working Foremen [employed by the respondent] in the Province of Ontario described in Appendix "B" hereto.". Appendix "B" describes the geographic scope of the organizing jurisdiction of each local union member of the Provincial Conference and for all practical purposes encompasses the Province of Ontario. Thus the Provincial Conference acquired bargaining rights for the aggregate area comprised of all geographic, organizing jurisdictions of its local unions. Those bargaining rights have not been terminated by this Board between the making of that agreement and this referral and they have not been abandoned, as respondent counsel has acknowledged and the Board has determined. Not only have the bargaining rights flowed through to the making of this referral but, in respect of the industrial, commercial and institutional sector of the construction industry, the Board is satisfied on all the evidence before it that the respondent has been/is bound to the four consecutive collective agreements referred to above. There is no doubt, therefore, that the Board has jurisdiction to hear this matter in respect of the industrial, commercial and institutional sector. It is not clear, however, whether the Board has jurisdiction to deal with this referral insofar as it purports to include other sectors because, while the Provincial Conference has bargaining rights for any of the respondent's employees employed in the trades referred to above, it is not clear that the Provincial Conference and respondent are bound to the current collective agreement insofar as it applies to sectors other than the industrial, commercial and institutional sector. The facts in respect of that issue are set out below.

7. For the purpose of ease and clarity of reference, each of the two collective agreements between the two designated bargaining agencies and between the Provincial Conference and MIECO will be referred to as a "Provincial Agreement" and the short-form collective agreements between the respondent and the Provincial Conference will be referred to as a "short-form collective agreement". The short-form collective agreement between the Provincial Conference and the respondent signed August 27, 1973 contains, *inter alia*, the following wording:

"2. The Employer hereby recognizes the Union as the Bargaining Agent of all of its Employees coming within the Bargaining Unit described in Article 1 of the Collective Agreement referred to in Paragraph 3 hereof.

3. Except as may be otherwise provided for herein, the Employer and the Union hereby agree to recognize, observe and be bound by all of the terms, conditions, provisions and appendices set forth in and forming part of a Collective Agreement made the 1st Day of May, 1973, between

the Union and the Masonry Industry Employers Council of Ontario and their Member Contractors (hereinafter called "the Agreement") as if original parties thereto. A copy of the Agreement is attached hereto and marked Schedule "A".

4. (a) All of the terms, conditions and provisions hereof (including those set forth in and forming part of the Agreement) both monetary and non-monetary are effective and operative as and from the 1st day of May, 1973 and shall remain in effect until April 30, 1976, and thereafter from year to year unless written notice be given not more than 120 days and not less than 60 days before the expiry date (or its anniversary, as the case may be) by the party desirous of change. On receipt of such written notice, the parties to this Collective Agreement shall convene a meeting within 30 days and endeavour to reach an agreement.

(b) Notwithstanding the foregoing, it is agreed that upon the parties to the Agreement entering into a renewal thereof, then the parties hereto shall be bound by the same as if original parties and the Employer shall execute such documents as may be presented to it by the Union in order to confirm and acknowledge such intention.

5. In the event of any of the terms, conditions, provisions and appendices of the Agreement are in any way altered, added to or amended by the parties thereto, then the parties to this Collective Agreement shall be bound by the same as if original parties thereto and the Employer shall execute such documents as may be presented to it by the Union in order to confirm and acknowledge such intention."

The Provincial Conference gave the respondent a copy of the Provincial Agreement, referred to in the short-form collective agreement as "the Agreement", which was in effect at the time. Prior to the expiry date of the Provincial Agreement, the Provincial Conference gave notice of its desire to bargain to the respondent. The evidence does not establish whether the Provincial Conference saw itself as giving notice under the terms of the short-form collective agreement or the Provincial Agreement. In any event, it concluded a new Provincial Agreement with MIECO and in due course it had the respondent sign a new short-form collective agreement containing the same language as quoted above, except where it refers to the period of operation of the Provincial Agreement. The respondent is named in Appendix "A" of that Provincial Agreement. The respondent is named in Appendix "A" of that Provincial Agreement which, according to the applicant, lists the names of contractors who are members of MIECO together with those contractors who are not members and are signed to short-form collective agreements.

8. Prior to the April 30th, 1978 expiry date of the Provincial Agreement which had come into force on May 24, 1976, the Provincial Council again gave notice of its desire to bargain to the respondent. This was done in the form of a letter addressed to the respondent, dated January 31st, 1978 and sent by registered mail on February 2nd, 1978. The contents of the letter are as follows:

"In accordance with Article 2 (Schedule "A") of the Collective

Agreement between your Company and The Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftsmen, effective May 24, 1976 — April 30th, 1978, which reads as follows:-

Article 2 — Conditions of Amendments and Duration of Agreement

“This Agreement shall be in effect from May 24th, 1976, until April 30th, 1978, and thereafter from year to year unless written notice be given not more than 120 days before the expiry date (or its anniversary as the case may be) by the Party desirous of change. On receipt of such written notice the Parties to this Agreement shall convene a meeting within thirty days and endeavour to reach an agreement”.

Please be advised that The Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftsmen will be seeking changes and/or amendments to the aforementioned Collective Agreement.

We trust you will give this matter your immediate attention in compliance with the above-mentioned Article 2.

Please advise by return mail which course you will be following:-

- (a) Will Bargain on your own behalf.
- (b) Will assign bargaining rights to M.I.E.C.O. (Masonry Industry Employers Council of Ontario).

Should you decide in favour of course (b), please follow instructions that will follow from M.I.E.C.O. (Masonry Industry Employers Council of Ontario).”

The wording in the letter which appears within quotation marks under the heading “Article 2 — Conditions of Amendments and Duration of Agreement” is the wording of Article 2 of the Provincial Agreement which expired April 30, 1978. The other three Provincial Agreements use the same language, except the two latter ones refer to the duration of the agreements as continuing bi-annually rather than from year to year, in order to conform with the requirement of the Act that Provincial Agreements in respect of the industrial, commercial and institutional sector, be for two year terms expiring on April 30th in each even year.

9. It was the applicants’ evidence that, when a Provincial Agreement was about to expire, the Provincial Conference served notice of its desire to bargain on MIECO and on the individual contractors who were signed to short-form collective agreements with the Provincial Conference. MIECO supplied the Provincial Conference with the names of the contractors who were its members and on whose behalf it was bargaining and the Conference in turn supplied MIECO with the names of the contractors who were signed to short-form collective agreements. The respondent’s name did not at any time appear on the lists supplied by MIECO. It was not at any time material to this reference a member of MIECO and there is

no evidence that it ever assigned its bargaining rights to MIECO. In fact, the evidence supports the opposite inference that the respondent did not assign its bargaining rights to MIECO. During the negotiating of the Provincial Agreements, the Provincial Conference and MIECO would settle the list of employers who would be bound by the agreement and these would then be set out in Appendix "A". The respondent's name appears in Appendix "A" in the three Provincial Agreements beginning with the one which expired April 30th, 1978. When a new Provincial Agreement was settled, the Provincial Conference would send it to each contractor which had been bound to the prior one along with a new short-form collective agreement to be signed by the contractor. In most instances the business agents of the local unions would call personally on the contractor to get his signature on the new short-form agreement. The evidence of Mr. Danny DeMonte, President of the Provincial Conference, was that, after the 1978-1980 Provincial Agreement was settled, the respondent was not required to sign a new short-form collective agreement because by then MIECO had been designated as the employer bargaining agency for those employers for whose employees the Provincial Conference, its locals and the International Union held bargaining rights. Beginning with the 1978-80 Provincial Agreement, MIECO also assumed responsibility for sending copies of the new agreement to all of the contractors listed in Appendix "A", not just to its own members.

10. Clause (b) of Article 1 of the current Provincial Agreement defines MIECO's bargaining rights in the following terms:

"The Union recognizes [The Masonry Industry Employers Council of Ontario] as the exclusive bargaining agent for *all members* as outlined in Appendix "A" and any other Employers desirous of entering into a contractual agreement with the Union in the geographic areas as described in Appendix "B" hereto."

(emphasis added)

Appendix "B" sets out the geographic jurisdictions of the local unions bound to the Provincial Agreement. This identical language appears in the other three Provincial Agreements.

11. Fred Jantz, president of the respondent, testified that some time in February 1978 he went to the offices of Local 23 in Sarnia, Ontario and orally notified three persons in the office whom he named to the Board and whom he believed to be officials of the Local, that he was no longer a member of the union and from then on was not going to be a union contractor. The union denies that this event ever occurred. For reasons which will be apparent later in the decision, it is unnecessary for the Board to resolve that difference.

12. The Board heard evidence that the respondent employed persons on a project which would appear to fall within the scope of the current Provincial Agreement insofar as it relates to the industrial, commercial and institutional sector without regard for the applicable terms of that Agreement.

13. The applicants contend that, by the respondent's act of signing the two short-form collective agreements with the Provincial Conference, the respondent made an irrevocable assignment of bargaining rights to MIECO. They contend further that, when the respondent signed the second of these two documents following the renewal of the Provincial Agreement which was effective May 24, 1976, it was fulfilling the obligation contained in paragraph 5 of

the extract from the first short-form agreement quoted above. Counsel for the applicants argues that it is because of the irrevocable assignment of bargaining rights to MIECO created when a contractor signs the short-form collective agreement that the Provincial Conference and MIECO followed the practice in collective bargaining of first exchanging lists of contractors at the commencement of bargaining and then incorporating those lists into Appendix “A” of the renewed Provincial Agreement at the conclusion of collective bargaining.

14. The applicants’ contentions are not supported by the facts before the Board. The two short-form collective agreements which the respondent signed contain no specific assignment of its bargaining rights to MIECO, nor do they contain even an undertaking by the respondent to make such an assignment. If those two documents viewed alone do not support the applicants’ claim, is it supported when they are viewed in conjunction with the Provincial Agreements to which they each refer and to the terms of which the respondent was bound as a result of having signed the two short-form documents? Clause (b) Article I of the Provincial Agreements establishes an undertaking of the Provincial Conference to recognize MIECO as the exclusive bargaining agent for two groups of employers: (1) “. . . *all members* as outlined in Appendix ‘A’ . . .” and (2) “. . . *any other* Employers desirous of entering into a contractual agreement with the union. . .”. (emphasis added). Since the respondent falls within the second group of employers, the Provincial Conference has recognized MIECO as the exclusive bargaining agent for the respondent. That recognition alone, however, only makes MIECO the exclusive bargaining agent for the respondent if it has the authority to represent the respondent in collective bargaining. It is clear that it has such authority in respect of the industrial, commercial and institutional sector of the construction industry pursuant to its designation as the employee bargaining agency under section 127(1) of the Act. That designation, however, does not bestow any bargaining rights upon MIECO in respect of other sectors of the construction industry. Therefore, in order for MIECO to bargain on behalf of the respondent, it must have authority independent of the designation.

15. The facts before the Board establish that MIECO has neither actual nor ostensible authority to bargain on behalf of the respondent. There is no evidence that the respondent ever made a specific assignment of bargaining rights to MIECO, it has not been a member of MIECO at any time material to this matter and, since the respondent has never been named on the lists of contractors supplied by MIECO to the Provincial Conference at the onset of collective bargaining, MIECO has not represented itself as acting for the respondent, therefore there is no evidence of it having ostensible authority to do so. On these same facts, it may be said that the deeming provisions of section 43(2) of the Act do not apply in these circumstances. Consequently, whether the wording of the two short-form collective agreements is viewed independent of or together with the Provincial Agreements to which they refer, no assignment of bargaining rights from the respondent to MIECO has been made by the fact of the respondent having signed the short-form agreements. There is no evidence and it was not argued that MIECO is an accredited employers association, therefore it does not have any statutory rights, duties or obligations arising out of section 116(1) of the Act which would empower it to bargain on behalf of the respondent.

16. There is not only an absence of facts on which to establish any positive assignment of bargaining rights from the respondent to MIECO, the facts reflect that the respondent retained the right to bargain on its own behalf. This is borne out by the wording contained in paragraphs 4 and 5 of the short-form collective agreement, in the practice of the Provincial

Conference giving separate notice of its desire to bargain to contractors signed to short-form agreement and in the wording of that notice. Paragraph 4(a) of the short-form collective agreement gives the respondent the right of serving notice on the Provincial Conference of its desire to bargain under that document. If it had irrevocably assigned its bargaining rights to MIECO, only MIECO could have given notice to bargain and have bargained on behalf of the respondent, and that bargaining could take place pursuant only to the Provincial Agreement. The provision contained in each of paragraphs 4(b) and 5 that "... the Employer shall execute such documents as may be presented to it by the Union in order to confirm and acknowledge such intention" would not be needed if the respondent had not retained bargaining rights independent of MIECO. The Provincial Conference not only served separate notices of its desire to bargain on MIECO and on the respondent, but its notice gave the respondent a clear choice of being represented in collective bargaining by MIECO or bargaining on its own behalf. It is stating the obvious to say that the respondent would not be able to bargain on its own behalf if it had irrevocably assigned its bargaining rights to MIECO.

17. The Board finds, therefore, that the respondent has not assigned its bargaining rights in respect of sectors other than the industrial, commercial and institutional sector of the construction industry to MIECO. The Board further finds that, since the Provincial Conference gave due notice to the respondent of its desire to bargain a renewal of the short-form collective agreement which was dated to expire April 30, 1978, that agreement was terminated on that expiry date. As a result of these findings and in respect of sectors other than the industrial, commercial and institutional sector, the respondent is neither bound to a collective agreement with the Provincial Conference alone nor with the International Union of Bricklayers and Allied Craftsmen and the Provincial Conference as the employee bargaining agency. In summary, therefore, the Board finds as follows:

- (a) the Provincial Conference is bargaining agent for all of the respondent's employees in all sectors of the construction industry who would fall within the bargaining unit described in the current Provincial Agreement between the International Union of Bricklayers and Allied Craftsmen and its Provincial Conference and MIECO;
- (b) the respondent is bound to the aforesaid collective agreement in respect of the industrial, commercial and institutional sector of the construction industry;
- (c) the respondent was bound to the Provincial Agreements between the Provincial Conference and MIECO which expired April 30, 1976 and April 30, 1978 in respect of all sectors of the construction industry; and
- (d) the respondent is not bound to the current Provincial Agreement between the International Union of Bricklayers and Allied Craftsmen and its Ontario Provincial Conference insofar as it relates to sectors of the construction industry other than the industrial, commercial and institutional sector.

18. Having regard to the evidence before the Board, its finding of facts thereon and pursuant to section 112a of *The Labour Relations Act*, the Board determines that:

- (a) Fred Jantz Masonry Construction Company Limited is bound to the Provincial Agreement for Ontario Bricklayers, Stone Masons and Plasterers, effective May 1, 1980 to April 30, 1982, between the International Union of Bricklayers and Allied Craftsmen and the Ontario Provincial Conference of the International Union of Bricklayers and [Allied] Craftsmen and The Masonry Industry Employers Council of Ontario;
- (b) Fred Jantz Masonry Construction Company Limited has violated the aforesaid collective agreement insofar as it applies to the industrial, commercial and institutional sector of the construction industry; and
- (c) Fred Jantz Masonry Construction Company Limited shall cease and desist from violating the aforesaid collective agreement insofar as it applies to the industrial, commercial and institutional sector of the construction industry.

19. The Board shall remain seized with this matter in the event that the parties are unable to agree on the amount of damages.

0975-81-R International Beverage Dispensers' and Bartenders' Union, Local 280, Applicant, v. 419748 Ontario Limited and 382844 Ontario Limited carrying on business as **The Horseshoe Tavern**, Respondent.

Sale of Business – Change in ownership of tavern – Whether “sale” within meaning of section 55 – Purchaser upgrading and renovating premises – Changing from “punk-rock” to country music – Whether business substantially different from predecessor’s

BEFORE: M. G. Mitchnick, Vice-Chairman, and Board Members J. A. Ronson and B. L. Armstrong.

APPEARANCES: *Beth Symes and Frank Cortese for the applicant; John M. Macaulay and John R. Lancot for the respondent.*

DECISION OF THE BOARD; September 25, 1981

1. This is an application under section 55 of *The Labour Relations Act*, alleging that a “sale of a business” has taken place, within the meaning of the Act. Section 55 provides as follows:

55.-(1) In this section,

- (a) “business” includes a part or parts thereof;

- (b) "sells" includes leases, transfers and any other manner of disposition, and "sold" and "sale" have corresponding meanings.

- ... (3) Where an employer on behalf of whose employees a trade union or council of trade unions, as the case may be, has been certified as bargaining agent or has given or is entitled to give notice under section 13 or 45, sells his business, the trade union, or council of trade unions continues, until the Board otherwise declares, to be the bargaining agent for the employees of the person to whom the business was sold in the like bargaining unit in that business, and the trade union or council of trade unions is entitled to give to the person to whom the business was sold a written notice of its desire to bargain with a view to making a collective agreement or the renewal, with or without modifications, of the agreement then in operation and such notice has the same effect as a notice under section 13 or 45, as the case requires.

2. The application arises out of a change in ownership of the premises known as The Horseshoe Tavern in the City of Toronto. As the name suggests, the premises prior to the sale were being operated as a tavern, being a public house directed to the sale of alcoholic beverages. As is normal in the business, the owners of the Tavern, being a company by the name of Samarina Investments Inc., engaged live entertainment to promote that end. To this extent, the business has remained the same following the sale. There have, however, been changes in format which require further elaboration.

3. The business and premises of the Tavern had deteriorated substantially by the time of the transfer in June of 1981. The music being featured at the Horseshoe at the time was described as "punk rock", resulting in a clientele described, not surprisingly, as "punk-rockers". The evidence establishes that, speaking generally, "punk-rockers are a somewhat distinctive group in society, identifiable by such indicia as pink-coloured hair, pins through the cheek, and patch-work clothes". They were described by the witnesses as being somewhat of a rough crowd, and the premises suffered considerable abuse by their presence. Food of limited sorts was available through an "open kitchen" which patrons could approach themselves, and an area of the floor was set aside for dancing. According to the evidence of Mr. Lanctot, one of the new owners, the selection of alcohol was severely limited as well, being primarily three types of liquor and often one type of (warm) beer.

4. Mr. Lanctot testified that he and his partnership, represented by the numbered companies named as respondents herein, are already the owners of a tavern in Ottawa, and were desirous of opening a second location in the City of Toronto. He explained that there are two types of liquor licences granted by the Liquor Control Board of Ontario, one being for a "lounge" area, and the other for a "dining-room". From the respondent's point of view, the main difference in the two licences is the extent of the requirements regarding food service, and since the respondents had no desire to go into the "restaurant" business, their only interest lay in acquiring a lounge licence in the City of Toronto. Unfortunately, according to Mr. Lanctot, such licences are virtually impossible to obtain, other than by way of transfer from an existing establishment. Accordingly, in December of 1980, the respondents entered into an agreement with Samarina Investments Inc. "to purchase all and singular the leasehold interest comprising the tavern business known as the Horseshoe Tavern situated at 368 to 372 Queen

Street West, in the City of Toronto”, conditional upon a successful transfer of the liquor licence. Samarina in fact had very little in the way of assets other than the lease of the premises, and the concomitant right to operate the tavern business thereon. Negotiations, therefore, were actually with the landlord, and the “purchase price” of the sale is essentially an agreement by the purchasers to pay off the various debts, by way of business and realty taxes etc., owing on the property. Pending the approval of the Liquor Control Board, the business was to continue to be operated by Samarina so as to maintain the licence in good standing. The Agreement of Purchase and Sale contained the following additional clauses of note:

- (e) That the contracts set out in Schedule “B” hereto are all of the contracts relating to the operation of the Horseshoe Tavern, that all such contracts are presently in full force and effect and will be in full force and effect as of the date of closing, that no party to any such contract is in breach or default thereunder, that there are no other contracts relating to the operation of the Horseshoe Tavern other than those set out in Schedule “B” hereto, and that the Vendor will not from the date of execution of this agreement until the date of closing, enter into any new contracts relating to the operation of the Horseshoe Tavern without the consent of the Purchaser. [there were no Schedules attached]. . . .
- (i) That the Vendor will use its best efforts to maintain the present staff used in the operation of the Horseshoe Tavern until the date of closing, and encourage them to stay on thereafter.
- (j) The Vendor will not increase the wages of the present staff used in the operation of the Horseshoe Tavern by more than five percent (5%) for any one individual . . .
- (l) That the Vendor will maintain the premises occupied by the Horseshoe Tavern in the same state of repair and condition as they are presently up to the date of closing, except reasonable wear and tear.

The transaction actually closed on June 17, 1981, following the approval of the licence transfer, and Samarina’s lease still had until December 31, 1981 to run. As a matter of legal form, it was agreed that the respondents would accept the assignment of Samarina’s lease as of the date of closing, and then immediately surrender the same to the landlord. The respondents at the same time entered into a new lease with the landlord, with the identical rent payable to the end of 1981 as that contained in the Samarina lease. A further term for the period beyond 1981 was negotiated with the landlord as well.

5. Following the change in ownership, the tavern was closed for a short period while the respondents carried out major renovations to the interior. The number of lounge seats was increased and the number of dining room seats decreased, and a new kitchen was built in an enclosed area at the back of the premises. New bars were installed, including for the first time a “stand-up” bar. The coolers, tables and chairs were the property of the landlord, and remained. In fact, a number of tables and chairs disappeared at the time that Samarina vacated, and the respondents were allowed a credit against their purchase price. The beer

pumps had been the property of Samarina, and were removed by them. The previous kitchen equipment had been the property of the kitchen operator, and left with the operator as well. The music is "country and western", and the clientele is now generally older and more sedate. The officer of the Metropolitan Toronto Police Morality Squad, called as a witness by the respondent, described them as simply a cross-section of "ordinary" people, although this group as well tends to have its distinctive dress of cowboy shirts and hats. From the evidence of all of the witnesses, it is clear that the premises have been upgraded by the new owners in every respect, and that the decor and clientele is demonstrably different from the days preceding the sale. The marketing theme is unmistakably country and western, and the respondents answer the telephone "The New Horseshoe Tavern". The new neon sign erected on the premises, however, still contains only the words "Horseshoe Tavern", and the business as well has been re-registered under the *Partnership Registration Act* in the name of "The Horseshoe Tavern". The reasons for this, the Board accepts, is a condition the landlord insisted be contained in the respondents' lease, as it was in Samarina's lease, as follows:

The Demised Premises are to be used by the Tenant only for the purposes of conducting the existing restaurant and tavern business thereon including entertainment (to be known as "The Horseshoe" and by no other name whatsoever without the Landlord's prior written consent) and shall not be utilized for any other purpose or purposes without the prior express written consent of the Landlord; any consent of the Landlord pursuant to this clause may be withheld by the Landlord in its sole and absolute discretion.

No former employee of Samarina has been employed by the respondents, nor, according to Mr. Lanctot, have any such individuals made application for employment.

6. Mr. Frank Cortese gave evidence on behalf of the applicant. Mr. Cortese is now the Secretary-Treasurer of the applicant, and has been with the applicant since 1958. He testified that even in 1958, when he arrived, the collective agreement was in force between the applicant and The Horseshoe Tavern, then operated by the present landlord, Jack Starr. Mr. Cortese testified that for years The Horseshoe Tavern had been known as the best spot for country and western music in Ontario. Annual trips to Nashville were organized by one of the Horseshoe's hostesses, an Aunt Bea, and advertised in the Tavern's windows although not in fact an undertaking of the Tavern itself. The Tavern was taken over by the Samarina Group in 1977, but Mr. Cortese indicated that the Tavern had been "punk rock" for no more than a year to a year and one-half prior to the sale to the present respondents. As a country and western fan, Mr. Cortese had been a patron of the Horseshoe during its earlier format, and conducted as well at least annual visits to the Tavern for business purposes after the change in format. Mr. Cortese was, therefore, in a position to identify with reasonable accuracy the period of change. Mr. Lanctot, on the other hand, has been residing in Ottawa, and testified that he had no knowledge whatever of the Horseshoe's prior history of country and western. The only other witness called by the respondents, the officer from the Morality Squad, was not asked to comment on the question of how long the "punk rock" format had been in place at the Horseshoe. The Board therefore finds that the "country and western" format had been replaced at the Horseshoe by the "punk rock" format for not more than a year and a half prior to the sale to the respondents. The Board notes as well that Mr. Lanctot conceded that the advertising theme of the "New" Horseshoe Tavern is: "Back to country and western", and that at least some of the current patrons of the Tavern have identified themselves as patrons from the days prior to "punk rock" taking over.

7. Mr. Lanctot testified that he had no knowledge of the Tavern's bargaining relationship with the applicant until he was approached by Mr. Cortese a week or so after the respondents reopened the Tavern. Mr. Cortese, for his part, testified that at least one of the employees of Samarina came to him at the time that the Tavern closed, and asked if he would be hired by the new owners. Mr. Cortese indicated that they would wait and see. Mr. Cortese acknowledges that it would have made more sense to approach the respondents to alert them to their obligations prior to new staff being hired and the Tavern opening, but explained that he got "caught up" in negotiations elsewhere. Notwithstanding Mr. Cortese's busy schedule, the Board would note the basic unfairness in the applicant sitting back on its position while new staff are being hired, some perhaps being induced to leave positions of employment elsewhere. The Board, however, is given no discretion with respect to the declarations which it may issue under section 55 of the Act, and the only issue before the Board is whether a "sale of a business" has taken place within the meaning of that section.

8. It is now clear from the Board's jurisprudence that a mere change in decor and entertainment such as occurred here is not a "change in the character of the business" within the meaning of section 55(5) of *The Labour Relations Act*. That section provides:

The Board may, upon the application of any person, trade union or council of trade unions concerned, made within sixty days after the successor employer referred to in subsection 2 becomes bound by the collective agreement, or within sixty days after the trade union or council of trade unions has given a notice under subsection 3, terminate the bargaining rights of the trade union or council of trade unions bound by the collective agreement or that has given notice, as the case may be, if, in the opinion of the Board, the person to whom the business was sold has changed its character so that it is substantially different from the business of the predecessor employer.

As the Board noted in *Jimmy's II*, [1977] OLRB Rep. Sept. 572, citing *Winco-Steak'n Burger*, [1974] OLRB Rep. Nov. 788:

... Having in mind the fact that subsection 5 runs against the flow of the general intent of the section, the Board takes the view that the words "substantially different" must be viewed by the Board in the formulation of its opinion as involving a fundamental difference affecting the nature of the work requirements and skills involved in the business to the extent that continued representation by the trade union would be inadequate, inappropriate or unreasonable in all the circumstances of the particular case under review.

See also *Katrina's Tavern*, [1978] OLRB Rep. Sept. 838; *Colonial Tavern*, [1978] OLRB Rep. Sept. 806. As in the cases cited, there can be no real dispute that the work in the tavern, as before the sale is essentially that of the applicant's craft members. Even the criticisms of Mr. Lanctot with respect to the performance he observed by employees formerly working for Samarina stemmed, at least at this stage, more from lack of adequate direction from management, than from any inherent incapacity on the part of the employees.

9. Beyond the question of section 55(5), however, remains the underlying question as

to whether a "sale of a business" has taken place within the meaning of the Act. In this regard, the Board has noted, e.g. in *Gordons Markets*, [1978] OLRB Rep. July 630:

17. No matter what the form of the transaction, in order to find that a section 55 sale has taken place, the Board must be satisfied that the result of the transaction is a continuation of the predecessor's business. Since it is the predecessor's business to which the union bargaining rights attach, the successor's business must draw its life from the predecessor's business. The subsequent existence of a business identical to that carried on by the predecessor will not result in a section 55 finding of a sale if the Board is satisfied that the second business is merely a parallel business of a similar nature rather than a continuation of the successor's business.
18. The question to be answered by the Board therefore is whether or not the business carried on by Gordons as a retail food market is a continuation of Loblaw's retail food business or whether it is a separate and parallel business, albeit of the same nature.

In developing the indicia of a "sale of business", the Board has also been careful to note the differences which may exist from one industry to another. See, e.g. *Tatham Company*, [1980] OLRB Rep. March 366, at paragraph 26.

10. Normally it is the applicant which exhorts the Board to look beyond the form of a particular transaction, and to consider instead its substance. In this case, the direct contractual relationship between the prior tenant and the respondents, transferring the tenant's leasehold interest, together with the provisions quoted earlier from the agreement of purchase and sale, are wholly consistent with a continuity of business operation, and "sale" between the predecessor employer Samarina and the respondents. In this case, it is the respondents who urge the Board to look beyond the standard legal form of the transaction to what was really transpiring between the respondents and the landlord. The Board accepts the fact that there has been a distinct change in clientele before and after the sale to the respondents, and that the only "goodwill" emanating from the premises as they were being operated at the time of sale by Samarina is of a *negative* variety, having established a reputation which the respondents are having difficulty "living down" in their new operation.

11. Contrary to the submissions of the respondents, however, it is more than just the nature of the business, in the sense of the sale of alcoholic beverages, which has remained the same. The business is being carried on at the same location, using the same name, and it is immaterial to the issue before the Board whether the use of that name is by choice or otherwise. The evidence demonstrates that, whatever argument could be made based on the "punk rock" direction of the Tavern in the period immediately preceding the sale, that direction was merely an interlude in the Horseshoe Tavern's long and well-established history as a "country and western" centre. While that recent interlude has made it more difficult for the respondents to reach back to the customers of old, it is obvious that that is what the respondents are trying to do, and have at this point succeeded to a minor degree. In *Stafford Hotel*, (unreported), Board File No. 1336-80-R dated December 15, 1980, a local neighbourhood pub also had fallen into disrepair (and disrepute) and had effectively been

taken over by a motorcycle group. On facts not wholly dissimilar from our own, the Board found at paragraph 3:

Although not an element in the agreement for purchase and sale, the respondent registered and is using the same name, "Stafford Hotel", to carry on its business as the predecessor used for the same purpose. Prior to an interlude preceding the transaction when the tavern was frequented by a motorcycle group, the tavern was a local neighbourhood bar. With the sale and renovations it is once again serving the local population. The Board is satisfied that the respondent, by using the same name and sign, is capitalizing on the goodwill the predecessor had built up in the neighbourhood prior to the advent of the motorcycle group and attendant liquor licence suspension.

12. The Board is satisfied, on all of the evidence, that in the present case as well a "sale of a business" has taken place within the meaning of section 55 of *The Labour Relations Act*, and that the bargaining rights of the applicant pertaining to The Horseshoe Tavern continue to bind the respondents as well. The applicant was therefore entitled to give notice to bargain to the respondents pursuant to the provisions of section 55(3) of the Act.

2367-80-U The International Association of Bridge, Structural and Ornamental Ironworkers District Council of Ontario; The International Association of Bridge, Structural and Ornamental Ironworkers Locals 721, 736, 759, 765 and 786; The Rodmen Employee Bargaining Agency, consisting of the aforementioned trade unions; Group of persons on their own behalf and on behalf of each and every member of the aforementioned trade unions, Complainants, v. **The International Association of Bridge, Structural and Ornamental Ironworkers**, Norman Wilson, Ontario Hydro and the Electrical Power Systems Construction Association, Respondents.

Evidence – Duty of Fair Representation – Practice and Procedure – Section 79 – Whether trade unions had authority to commence proceedings against international union – Dispute as to location of burden of proof – Whether complainant trade unions having status to file section 60 complaint

BEFORE: R. A. Furness, Vice-Chairman, and Board Members H. J. F. Ade and C. A. Ballentine.

APPEARANCES: *Maurice A. Green, Ken Childs, Allan MacIsaac, Don Melvin, Larry Baillis and Gord Verdecchia for the complainants; A. M. Minsky, S. B. D. Wahl and N. Wilson for the International Association of Bridge, Structural and Ornamental Ironworkers and Norman Wilson; H. A. Beresford and W. S. O'Neil for Ontario Hydro and the Electrical Power Systems Construction Association.*

DECISION OF THE BOARD; September 17, 1981

1. The complainants have complained that the complainants have been dealt with by the respondents contrary to the provisions of sections 56, 59(1) (2) and 60 of *The Labour Relations Act*. Briefly, the complainants have alleged that collective agreements have been concluded by the respondent International Association of Bridge, Structural and Ornamental Ironworkers (the “International”) through the respondent Norman Wilson without either consultation with the complainants or considering their proposals. The complainants have also alleged that the collective agreements with Ontario Hydro and the Electrical Power Systems Construction Association (“EPSCA”) which have been concluded have not been subject to the usual approval by the membership of each complainant local trade union.

2. The complainants have requested a declaration that the respondents have breached the provisions of the Act referred to in paragraph one and (i) a declaration that the purported collective agreements signed by the International encompassing ironworker rodmen are null and void and that the respondent (sic) be ordered to permit the complainants to participate in the process of negotiation including the requirement that the respondents place before the relevant employer association or Ontario Hydro each and every proposal agreed upon for inclusion in negotiations by the membership of the complainants and of the District Council, (ii) a declaration that the respondents make every reasonable effort to negotiate and support such proposals, (iii) a declaration that the respondent (sic) be ordered to permit the complainants to subsequently hold ratification meetings to either approve or reject the proposed collective agreements, (iv) a declaration that the International reinsert the “signing

page” of one of the collective agreements, as originally approved and ratified by the complainants, (v) a declaration that EPSCA and/or Ontario Hydro be ordered to cease and desist from requiring members of the Rodmen Employer Bargaining Agency to adhere to or agree to implement the terms of the collective agreement, if any, entered into between EPSCA and the International encompassing rodmen, when such members of the Rodmen Employer Bargaining Agency submit bids for work to be performed on projects of Ontario Hydro and that EPSCA and Ontario Hydro be ordered to bargain only with the International when a negotiating committee of the International is present and made up of representatives from each complainant local trade union or its approved delegates, (vi) a declaration that, if the Board declare null and void the said collective agreements as herein requested, the terms and conditions set out in such agreements be frozen pursuant to the provisions of the Act until the parties have met and negotiated and the requirements of the Act have been satisfied before such terms and conditions can be altered, (vii) a declaration that, if the International, Ontario Hydro and EPSCA be ordered to pay all damages arising out of their illegal actions and which give rise to loss of income and benefits to each member of the complainants who have been forced to work under agreements which they had no opportunity to authorize or ratify, such monies be paid with interest from the date at which they should have been received, and (viii) an order that the respondents be ordered to pay all legal costs of the complainants arising out of this complaint.

3. At the commencement of the hearing in this complaint, counsel for the International and Norman Wilson made a motion to strike out the names of the International Association of Bridge, Structural and Ornamental Ironworkers District Council of Ontario (the “Council”), the Rodmen Employee Bargaining Agency (the “Agency”) and the International Association of Bridge, Structural and Ornamental Ironworkers, Local 700 (“Local 700”) from the list of complainants in the style of cause. Counsel informed the Board that it was his information and understanding that the Council had not authorized the making or filing of a complaint and that such a complaint had not been authorized under the constitution of the Council in that there had not been a duly convened meeting as required under the constitution. Counsel pointed out that the Agency pursuant to a designation by the Minister of Labour dated March 21, 1978, consisted of the International and the Council. It was the position of counsel that his client the International had neither been asked for its approval nor given its consent to any proceeding against itself. It was his position that, in the absence of any constitution and by-laws for the Agency, the consent of the International and the Council is required in order to commence any proceeding under the Act in the name of the Agency. Counsel informed the Board that he had been advised by James Harrower, the business agent of Local 700, that Local 700 did not wish to be part of these proceedings and that Mr. Harrower would so inform counsel for the complainants.

4. Counsel for the International and Mr. Wilson argued that the onus of establishing authority or competence to act lies on he who asserts an authority or competence to act. Counsel further argued that the Agency is a statutory creation under section 127(1)(a) of the Act and consists of the International and the Council. Counsel stressed that an entity such as the Agency which did not have a constitution, by-laws or officers could only act by consensus and that in the circumstances consensus meant unanimity. It was the position of counsel that the International had never authorized this proceeding and that the Council had never held a meeting where it had been determined that this complaint should be brought before the Board. Counsel characterized any meeting of business agents who are representatives on the Council was merely a meeting of these business agents and not a meeting under the constitution and by-

laws of the Council. Counsel further argued that, in any event, none of the complainants may make a complaint under section 60 because none of the complainants are employees and that none of the business agents named as complainants may make a complaint under section 59(2).

5. Counsel for the complainants argued that the International was estopped from making the motion referred to in paragraphs three and four because of the lapse in time between the filing of this complaint and the raising of the matters referred to in the motion some four days prior to the hearing of this complaint. Counsel also argued that the International had never raised the failure of the Council to call a meeting under its constitution and by-laws until the hearing before the Board. It was the position of counsel that he had been authorized by the Council to file this complaint and that Mr. Harrower had had an opportunity to inform him that he did not represent him and had not done so. Subsequently, however, Mr. Harrower appeared before the Board and informed the Board that he had instructed counsel for the complainants that Local 700 did not wish to be a party to this complaint. On the agreement of all parties Local 700 was deleted from the names of the complainants. Counsel further argued that, in the event the Board entertained the motion, the onus of establishing authority or competence to act lies on the person who challenges the right of his clients to be before the Board. Counsel informed the Board that he was advised that the Council and the Agency had authorized this complaint. He argued that he was entitled to file this complaint and that the International and Norman Wilson ought to be required to prove the lack of authority or competence which their counsel is alleging.

6. Counsel for Ontario Hydro and EPSCA did not take a position with respect to the merits of the motion of counsel for the International. He informed the Board that the replies had not been filed on behalf of Ontario Hydro and EPSCA in the hope that the differences within the International would be resolved.

7. In the circumstances of this complaint, the Board finds that the International is not estopped from making its motion. There is nothing before the Board which even suggests that the International has induced conduct by the complainants which they have relied upon. The International gave notice of its motion to the complainants prior to the hearing and it may not be said that the complainants were prejudice in replying to the motion.

8. In the course of the presentation of a reply to the motion few, if any, facts were agreed to by the parties. The question of which party has the burden of proving a particular fact must be considered from the point of view of the two aspects of the legal burden and the evidential burden. The legal burden may be defined as the obligation of a party to meet the requirement of a rule of law that a fact in issue be proved or disproved either by a preponderance of the evidence or beyond reasonable doubt as the case may be. The evidential burden may be defined as the obligation to show, if called upon to do so, that there is sufficient evidence to raise an issue as to the existence or non-existence of a fact in issue. See *Cross on Evidence*, 4th edition, p. 75. More often than not, the two different burdens fall upon the same party so that the party in question must lead evidence with a view to proving the allegations it is making. However, there may be circumstances where it is proper to place the evidential burden on one party, while leaving the legal burden on the other party. On occasions, certain facts by their very nature will be peculiarly within the knowledge of one of the parties. As *Cross, supra*, at page 85 states:

The existence or non-existence of a fact in issue may be known for certain by one of the parties and this is often said to have an important bearing on the incidence of the burden of proof of that fact. It is only reasonable that the evidential burden should be affected in some cases.

9. It is clear that the Board may determine its own procedure within the ambit of the jurisdiction conferred upon it by the Act. In *Re Cedarvale Tree Services Ltd. and Labourers' International Union of North America, Local 183*, [1971] 3 O.R. 832, Arnup, J.A., expressed it as follows at p. 841:

It is clear to me that under the Labour Relations Act the Board is master of its own house not only as to all questions of fact and law falling within the ambit of the jurisdiction conferred upon it by the Act, but with respect to all questions of procedure when acting within that jurisdiction.

This reasoning was followed in *Re Flamboro Downs Holdings Ltd. and Teamsters Local 879*, [1979] 24 O.R. (2d) 400.

10. With the deletion of Local 700 from the complainants it appears to the Board that there is no longer a question that counsel for the complainants has been authorized to act for at least some of the complainants. The question of whether counsel for the complainants has been authorized to represent all of the complainants depends upon various question of fact and law. Since there has not been any agreement on the facts in dispute, it is necessary for the Board to hear the evidence on the issues in dispute from all of the parties. It appears to the Board that the complainants are relying on the performance of certain alleged conduct as authorizing the making of this complaint and that this alleged conduct is peculiarly within the knowledge of the complainants. In these circumstances, the Board determines that the complainants bear the evidential burden of introducing this evidence before the Board.

11. With respect to the legal burden, various authorities were cited before the Board. Counsel for the International cited the case of *Sasko-Wainwright Oil and Gas Ltd. v. Old Settler's Oil Ltd.*, (1957) 7 D.L.R. (2d) 393, in support of the proposition that the burden is on the complainant trade unions to prove to the satisfaction of the Board that they have authority to commence proceedings. Johnson, J.A., addressing a preliminary objection, actually disposed of the preliminary objection on the basis that since want of capacity was an issue in the case, the Court should not dispose of the appeal on such a preliminary objection. However, the following comment is one of some interest, at p. 395:

Solicitors who purport to act for parties in litigation if their authority to act is challenged (and that may be by an opposite party) then must show their authority to act. Mr. Maclean was appointed solicitor for the appellant company some time before the disputed meeting so no question can be raised as to his being that company's solicitor. Lord Eldon in *Wright v. Castle* (1817), 3. Mer. 12, 36 E.R. 5, says that a general authority is sufficient to enable a solicitor to defend a suit though not to commence one, but I think the better view to be that of North J. in *Re Gray* (1891), 65 L.T. 743, where he holds that there is no such thing as a general authority, at least with respect to a litigation. In any case, it would appear that Mr. Maclean acted on special instructions from the

directors who have been declared improperly elected so that I do not think that he would be entitled to rely on his appointment as general solicitor for the company. The position of the Court in cases where an opposite party questions the authority to bring and defend suits is stated by Roche L. J. in *John Shaw and Sons (Salford) Ltd. v. Shaw*, [1935] 2 K.B. 113 at p. 147: "I agree with both the Lords Justices as to the result in the decided cases and particularly of the *Daimler* case, [1916] 2. A.C. 307, and of the *Russian Commercial Bank* case, [1923] 2 K.B. 630; [1925] A.C. 112. The principles to be derived from them are that such an objection to a right to sue as is here taken should be taken not at the trial but by an interlocutory motion or summons; that if such procedure is not adopted the Court need not, and ordinarily should not, entertain such an objection at the trial as if it were a defence. It is were otherwise, then for reasons pointed out by Warrington J. in *Richmond v. Branson*, [1914] 1 Ch. 968, the position of the Court would be well nigh intolerable. Nevertheless, as appears from the decision in the *Daimler* case [supra], if want of capacity or authority to sue plainly appears at any stage the Court may then strike out the action."

The decision of the Court in that case, however, deals with the stage at which an objection to authority to act ought to be raised. There is no issue in the instant complaint that the International and Norman Wilson have raised their objection at the commencement of this complaint. That case, however, does not address itself to the question of the onus of establishing authority or competence to act. In *A. V. Hallam*, [1973] OLRB Rep. Nov. 599, the Board considered the issue of authority on competence to act and stated:

Having regard to the representations of the parties, the Board finds the authority and competence of individuals to represent the applicant and Local 97 have been brought into issue. The Board will entertain these issues. The onus of establishing the lack of authority or competence in the circumstances of this application rests with the party which seeks to assert the proposition which is not self-evident, i.e. which seeks to assert the lack of authority or capacity. See *Robins v. National Trust Co. Ltd.*, [1972] All. E.R. Rep. 73; and *Halsbury*, Laws of England (3rd edition) Vol. 21, p. 267.

12. The Board is of the opinion that the views expressed in *A. V. Hallam*, *supra*, apply to the instant complaint. The legal burden rests with the International and Norman Wilson to establish what they are alleging, namely, that the complainants do not have the authority or competence to make certain complaints within this proceeding.

13. The Board agrees with the International and Norman Wilson that none of the complainants may make a complaint under section 60 because none of the complainants are employees in a bargaining unit. Section 60 confers rights on "employees in a bargaining unit" with respect to their trade union. In *Arthur Joseph Roberts*, [1974] OLRB Rep. March 169, the Board discussed the scope of section 60 and stated at pages 175-176 as follows:

17. Would the Board therefore be on a sound footing in granting relief to persons who are not employees for purposes of section 60 of the Act?

In this regard the Board has come to the conclusion that it would do violence to the intent of the Legislature if it presumed the members of a trade union affected by a union hiring hall are "employees in a bargaining unit" for purposes of supervising the operation of that hiring hall through the union's alleged duty of fair representation.

18. We are satisfied that it was the intention of the Legislature to restrict the scope of a trade union's fair representation to employees in a bargaining unit. It would be a forced interpretation of the word employee in section 60 for the Board to presume the contrary where the Legislature permits parties to the collective bargaining relationship under section 38(1)(a) of the Act to determine through negotiation the very conditions upon which the employer-employee relationship may be established. It is the Board's opinion that if the Legislature intended the scope of the trade union's duty of fair representation to extend beyond employees in a bargaining unit it would have done so in the clearest language. The Legislature has given the Board a clear mandate with respect to granting relief against discriminatory hiring practices based on trade union activity. It has not done so for purposes of section 60.

This interpretation of section 60 has been followed in *United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 46*, [1980] OLRB Rep. May 808. This complaint is dismissed insofar as it relates to a complaint under section 60 of the Act.

14. Counsel for the International and Norman Wilson made a further motion with respect to particulars of the complainants' allegations. In our view, this decision has incidentally addressed some of the concerns of counsel. The parties are directed to meet and endeavour to resolve the question of the adequacy of the particulars. In the event that issues are not resolved by the parties prior to the next hearing, the Board will entertain a motion on particulars by counsel for the International and Norman Wilson.

15. The matter is referred to the Registrar to be listed for continuation of hearing.

2494-80-R Service Employees Union, Local 204 Affiliated with A.F. of L., C.I.O., C.L.C., Applicant, v. **K Mart Canada Limited**, Respondent, v. Group of Employees, Objectors.

Bargaining Unit – Whether employees of single store or employees in all of respondent's stores in Metro Toronto appropriate unit – **No presumption in favour of most comprehensive unit** – **Board reviewing criteria for granting non-municipal wide units** – **Board taking into account industry bargaining pattern**

BEFORE: Kevin M. Burkett, Alternate Chairman, and Board Members O. Hodges and F. W. Murray.

DECISION OF THE BOARD; September 10, 1981

1. This is an application for certification.
2. In a decision dated March 25, 1981, the Board outlined the dispute between the parties with respect to the geographic scope of the bargaining unit and ruled that it was prepared to hear "whatever additional relevant evidence the respondent wishes to adduce" in support of its position. The respondent had advised the Board by letter dated March 20, 1981 of the evidence it wished to lead and a hearing had been scheduled for April 29, 1981. The hearing was subsequently rescheduled to July 2, 1981 on agreement of the parties. However, by letter dated June 1, 1981 counsel for the respondent advised the Board as follows:

"... I have now been instructed by my client not to call the evidence which I wished to call as set out in my letter to the Ontario Labour Relations Board of March 20, 1981. It is the position of the Respondent that the Labour Board should decide the issue of the appropriate geographical scope of the bargaining unit on the basis of the agreed to facts submitted by the parties at the original hearing held on March 13, 1981. Accordingly, we would ask the Ontario Labour Relations Board to cancel the hearing originally scheduled for July 2, 1981 and proceed to decide the matter as suggested."

3. The issue to be decided is whether or not the appropriate bargaining unit should be described by the Board in terms of all employees of the respondent in Metropolitan Toronto, or in terms of all employees of the respondent at its department store located in the Bayview Village Centre. The company operates four retail department stores in Metropolitan Toronto including the store located in the Bayview Village Centre. The union has organized the employees of the company at its Bayview Village location and seeks to be certified as bargaining agent for the employees of the company at that location. The respondent company, on the other hand, seeks to have the unit described in terms of all of its employees in Metropolitan Toronto.

4. The facts, as agreed between the parties, are as follows:

— The company operates four department stores within the boundaries of Metropolitan Toronto. These stores are located at 1530 Albion Road, Rexdale, Ontario M9N 1B5, 2901 Bayview

Avenue, Willowdale, Ontario M2K 1E6, 87 Ellesmere Road, Scarborough, Ontario M1R 4B7 and Bridlewood Mall, 2900 Warden Avenue, Scarborough, Ontario M1W 2S8. It is a matter of record that there are a total of 127 full and part-time employees at its Bayview Village store who would fall within the bargaining unit.

- Each store has its own manager and personnel officer. The store manager reports to the district manager who in turn reports to a senior vice-president of store operations. A district comprises a number of regions. The Metro region, within which the Bayview Village store and the other three stores within Metropolitan Toronto are located, also includes stores in Oshawa, Newmarket, and Oakville.
- The company has a corporate personnel department whose responsibility it is to set standard personnel policies and practices for all of its stores. These policies and practices are administered at the local store.
- Rates of pay are determined at the Corporate level so that wages and benefits are essentially similar between store locations.
- Hiring is done on a store by store basis.
- The interchange of employees between store locations is insignificant.

5. The company argues in support of a municipal-wide bargaining unit. The company maintains that the practice of the Board in defining bargaining units in the retail service store industry as well as in retail food and Brewers' Warehouse outlets, as enunciated in *Re Goodyear Services Center* case 65 CLLC ¶16,018, is to certify for all stores within a given municipality. The company refers to *Fotomat*, [1979] OLRB Rep. April 306; *Tip Top Tailors*, [1979] OLRB Rep. May 445 and *S.S. Kresge* Board file 0520-75-R, unreported, in further support of its contention that a municipal-wide unit description in the retail sector is appropriate. The company maintains that the effect of granting a certificate for an individual store would be to create a new kind of organization for the employer and, in addition, would serve to embroil the employees at the other locations in collective bargaining disputes which they may have no desire to become involved in. It has intimated as well that the result of single store certification might be a proliferation of bargaining units. The company distinguishes the instant case from both *Ponderosa Steak House (A Division of Foodex Systems Limited)*, [1975] OLRB Rep. Jan. 7 and *McDonald's Restaurants of Canada Limited*, [1974] OLRB Rep. Oct. 755 on the grounds that the standardization between K Mart locations, where head office personnel actually work in the stores, is more significant than that found in "hamburger houses and steak spots". The company maintains that the Board must look to bargaining structures which will work and argues that the proven viability of all-store units should convince the Board to follow its standard practice with respect to retail outlets. The company points to the certification within the banking industry on a branch by branch basis as an example of a bargaining structure which has not worked. The company asks for an all-store unit description.

6. The union refers to the broad discretion given to the Board under section 6(1) of the Act to determine the appropriate bargaining unit and argues that where a bargaining unit description accords with the wishes of the employees, as put to the Board through the union, and encourages the practice of collective bargaining, in accord with the purpose of the statute, the unit should be found to be appropriate. The union cites both the *McDonald's* case, *supra*, and the *Ponderosa* case, *supra* as standing for the proposition that where these criteria are established the onus falls to the company to demonstrate that the proposed unit will not work. The union maintains that in this case the company has failed to establish, on the tests set out in the *Usarco* case, [1967] OLRB Rep. Sept. 526, that the four stores in Metropolitan are an integrated operation. The union maintains that on the evidence it must be found that the day to day control rests with the manager of the individual store who operates under standardized procedures. Furthermore, the union argues that it has not been established that the consequences of a single store certification are such as should cause the Board to deny the employees at the Bayview Village store certification. The union maintains that it doesn't make sense to apply the same rule to a department store chain as to a retail food chain and cites the *Canada Trustco* case, [1977] OLRB Rep. June 330, as an example of a retail service where the Board disregarded the approach followed in respect of retail food stores. In considering *Goodyear Service Centre*, *supra*, relied upon by the company, the union asks the Board to be mindful of the fact that the union had organized at all of the locations of the company in that case and was asking for the municipal-wide certificate. The union maintains that the issue before the Board in this case is not addressed in *Fotomat*, *supra*; *Tip Top Tailor*, *supra* or the *S. S. Kresge* case, *supra*, so that these cases do not assist. The union asks the Board to find that the single store unit is the appropriate unit in this case.

7. The Board is given a broad discretion under section 6(1) of the Act to determine the appropriate bargaining unit in all certification applications brought before it. The Board's determination in this regard establishes the constituency within which a trade union must demonstrate majority support in order to become certified and, in addition, sets the initial parameters within which bargaining will take place if certification is granted. The establishment of the constituency is of direct concern to the parties at the time of certification in that this decision is often determinative of whether a union has support within the bargaining unit sufficient to be certified. Trade unions generally find it easier to organize a homogeneous, centralized group of employees and, therefore, will often argue for a narrowly defined unit. Employers, recognizing that a union will have greater difficulty organizing on a wider basis, and recognizing further that it may be administratively easier to bargain on a broader basis, often take the opposite tack. (See re *McDonald's Restaurants of Canada Limited*, [1974] OLRB Rep. Oct. 755, *Ponderosa Steak House (A Division of Foodex Systems Limited)*, [1975] OLRB Rep. Jan. 7, *Commonwealth Holiday Inns of Canada Ltd.*, [1970] OLRB Rep. Oct. 749 and *Canada Trustco Mortgage Company*, [1977] OLRB Rep. June 330). However, where the union has sufficient support to warrant certification for a broader constituency it will argue for a broader unit in the hope of augmenting the strength from which it will seek to bargain. In these circumstances employers will be predisposed to seek a narrowing of the union's bargaining rights. (See, *Goodyear Service Stores 65 CLLC* ¶16,018, *Cybermedix Ltd.*, [1974] OLRB Rep. Aug. 743 and *Adams Furniture Co. Ltd.*, [1975] OLRB Rep. June 491). One case is especially illustrative of the pragmatic considerations which govern the parties in their approach to bargaining unit determinations. In *York Steel Construction Limited*, [1980] OLRB Rep. Feb. 293, the union, which was seeking a pre-hearing vote, asked for a single plant unit while the respondent asked for a unit encompassing both its plants within the municipality. Before entertaining submissions with respect to the bargaining unit

the Board conducted the pre-hearing vote but segregated the ballots from each plant. If the union failed to win a sufficient majority in the larger plant the application would fail and so the ballots cast by employees at the larger plant were counted. When it became known that the ballots cast by these employees gave the union a sufficiently wide majority that it was assured of obtaining bargaining rights for both plants, regardless of how the employees at the smaller plant voted, the parties reversed their position's with respect to the scope of the appropriate bargaining unit.

8. Although the Board must be sensitive to the impact of its bargaining unit determinations upon the ability of trade union's to organize, there are other factors which must also be taken into account. The objectives of the statute relate not only to the promotion of collective bargaining as a means of determining terms and conditions of employment, but also to a recognition of the principle of individual freedom of choice, and to the creation and maintenance of sound and viable bargaining structures. In determining the appropriate bargaining unit the Board does not give effect to one of these aims to the exclusion of the others. Rather, the task which falls to the Board in the exercise of its discretion under section 6(1) of the Act requires a balancing of these statutory objectives in the circumstances of each case. The Board practice of circumscribing bargaining rights by reference to the municipal boundary, segregating plant and office employees and requiring the inclusion of all office or all production employees within a single bargaining unit reflects this balancing.

9. Nowhere is the balancing of the statutory objectives more evident than in the Board's normal practice of circumscribing the geographic scope of bargaining rights by reference to the municipal boundary within which the employer operates. Where there is only one location within a municipality the board will define the unit in terms of all employees within the municipality. Under a regime of municipal-wide certification bargaining rights follow an expansion or relocation of the business within the municipality; but not beyond. The freedom of choice of employees to make the initial selection of a bargaining agent at future sites within the municipality is sacrificed in favour of the stability of the bargaining rights conferred by the certificate. However, these rights do not extent beyond the municipality in deference to the right of employees at new locations outside the municipality to select a bargaining agent of their choice. The use of the municipal boundary represents an attempt by the Board to strike a rough balance between stable bargaining structures and individual freedom of choice.

10. Where the employer operates at two or more locations within a municipality at the time of certification a number of other considerations come to the fore which must be taken into account by the Board. Because the operations are in existence the Board is able to make a first hand assessment of the community of interest between the employees at the two locations. The factors to be considered in determining if a community of interest exist have been set out in the leading of *Usarco* case [1967] OLRB Rep. Sept. 525. In making this determination the Board looks to:

(A) *NATURE OF WORK PERFORMED* — In the instant case, the employees at both locations perform the same type of work involving similar operations, even though different metals are processed at the two locations;

(B) *CONDITIONS OF EMPLOYMENT* — Similar working conditions and the same fringe benefits prevail at both locations.

(C) *SKILLS OF EMPLOYEES* — The skills of the employees as a group are similar at both locations;

(D) *ADMINISTRATION* — The company administers both phases of its operations jointly;

(E) *GEOGRAPHIC CIRCUMSTANCES* — The two plants in question are 2½ miles apart in the same municipality;

(F) *FUNCTIONAL COHERENCE AND INTERDEPENDENCE* — The evidence discloses about ten instances of regular temporary interchange among employees who intermingle with employees of the other plants. In addition, although of less importance, a substantial part of the production is at one plant and completed at the other.

11. Three other factors are referred to in the *Usarco* decision as separate and distinct from community of interest. These are, centralization of managerial authority, the economic advantages to the company of one unit versus another, and the source of work. These factors relate to the nature of the employer's organization and evidence a recognition by the Board that viable bargaining structures reflect the reality of the employer's organization. There are other important considerations which enter the picture as well where the employer operates from two or more locations within the same municipality. Where it is raised as an issue the Board must consider the effect of a broader based unit upon employee access to collective bargaining within the industry. In addition, the Board must recognize the wishes of the employees affected by the particular application to bargain collectively. This latter consideration requires the Board to take into account the pattern or organization in the case before it and to balance the pattern of organization against the disruptive effects of excessive fragmentation. The potential for fragmentation takes on an added weight where the Tribunal lacks the authority to restructure existing bargaining units at some future date. The nature of the deliberations which are undertaken by the Board in determining the appropriate bargaining unit where the employer operates from two or more locations within the municipality are summarized in the following passage from the Board's *Ponderosa Steakhouse* decision:

"The determination of what constitutes a viable collective bargaining structure requires the Board to consider matters of industrial relations policy, such as community of interest and fragmentation of employees. Community of interest may be a requisite for viable collective bargaining, since the representation of disparate employee groups by one bargaining agent may put impossible strains upon it as it performs its role in the bargaining process. At the other extreme, a too narrow definition of community of interest may create undue fragmentation of employees, leading to a weak employee presence at the bargaining table, or the possibility of jurisdictional disputes among competing bargaining groups. It should be observed, however, that the Act does not create any presumption in favour of the most comprehensive unit of employees, even though these employees may have a community of interest. Section 1(1)(b) of the Act states that: "bargaining unit" means a unit of

employees appropriate for collective bargaining, whether it is an employer unit or a plant unit or a subdivision of either of them”.

This provision makes it quite clear that the determination of appropriateness does not always lead to the conclusion that the most comprehensive unit is also the most appropriate unit. Consideration of the wishes of employees, and of industrial relations policy, may very well dictate that a smaller bargaining unit is the appropriate unit. This point was clearly made in *Board of Education for the City of Toronto* case, *supra*.”

12. The Board is called upon to shape bargaining structures over a wide segment of both the manufacturing and service industry operating within the province, including hospitals, universities, municipalities and retail establishments. Each of these sectors has presented its own special problems vis-a-vis bargaining unit determination. In dealing with retail stores the single location unit versus a municipal-wide unit, where the employer operates at more than one location within the municipality, has been the major bargaining unit issue to be addressed. The issue was first dealt with in respect of retail food stores where the Board determined as a general matter that the appropriate unit should encompass “all employees at its stores” in the municipality. (See *Oshawa Wholesale*, [1965] OLRB Rep. Feb. 584). The Board’s practice in this regard appears to have successfully balanced the statutory objectives referred to earlier in that the retail food industry is highly organized and bargaining is conducted within structures which have proven to be effective.

13. The Board’s practice of certifying for all stores within the municipality in retail food stores was applied by the Board to retail service stores in *Goodyear Service Stores*, *supra* where the Board, over the objection of the employer, certified the union as bargaining agent for eight service stores within the municipality of Metropolitan Toronto. The Board held in that case that,

“... where an employer conducts essentially similar retail or service store operations at a number of locations in a given geographical area it would not, generally speaking, be conducive to sound collective bargaining for a series of bargaining units to be established in respect of groups of employees performing similar tasks and having similar bargaining interests. Such a situation where some employees might be represented by one trade union, others by another and others not at all would be invidious from the employer and trade union points of view as well as from the points of view of most individual employees.

The Board, therefore, considers that the policy it has followed in cases of retail food markets, variety chain stores and brewers’ warehousing stores, and which has frequently been applied in other cases involving retail or service stores, should be adopted as its general policy in cases of retail or service stores where the interests of employees throughout a group of stores can be said to be essentially similar as in the present case.

The Board found that all employees at all the respondent’s service stores within the municipality with certain named exclusions, to be a unit appropriate for collective bargaining. For

purposes of our analysis it is important to note that the unit determination in the *Goodyear* case recognized the pattern of bargaining and did not in anyway impede the access to collective bargaining of the employees in any one store. Although commenting that "this is not a relevant factor in determining the bargaining unit" the Board noted that "the applicant has members in each store and in each case but one, this membership constitutes a majority of the employees in the store". Furthermore, no mention is made of the interchange, or lack of interchange, of employees between stores in the *Goodyear* decision; a factor of major significance in determining if a community of interest exists between employees at separate locations. The *Goodyear* decision, *supra*, is cited with approval in *Cybermedix Limited*, [1979] OLRB Rep. Aug. 743 where the Board certified the union as bargaining agent for the employees of the company at all seventeen of its locations within Metropolitan Toronto. The employer in that case operated a medical testing laboratory service. In the *Cybermedix* case, as in *Goodyear*, the union had organized at all locations and notwithstanding the fact that "there may be no substantial interchange of employees between locations and the functions of hiring and supervision are confined within the locations", the municipal-wide unit was found to be appropriate.

14. In a number of recent retail cases the Board has made it clear that there is no presumption in favour of the most comprehensive unit and has declined to follow the policy enunciated in the *Goodyear* case, *supra*. The circumstances under which the Board has done so illustrate the delicate balancing which must be done by the Board under section 6(1) of the Act. In these cases the Board found a single location unit to be appropriate where —

- (1) the company operated from a number of retail locations within the municipality,
- (2) local management had control over day to day employment relations,
- (3) there was little or no interchange of employees between locations,
- (4) the union (in contrast to *Goodyear*, *supra*, and *Cybermedix*, *supra*) had organized on a one location basis, and
- (5) a broader based structure might significantly impede employee access to collective bargaining.

(See *Canada Trustco Mortgage Company*, [1977] OLRB Rep. June 330; *McDonald's Restaurant of Canada Limited*, [1974] OLRB Rep. Oct. 755; *Ponderosa Steak House*, [1974] OLRB Rep. Nov. 7 and *Commonwealth Holiday Inns of Canada Limited*, [1970] OLRB Rep. Oct. 749). The balance which has been struck by the Board in the circumstances of these cases has been aptly described in the following passage from the *Canada Trustco* decision, *supra*,

"In determining the appropriate bargaining unit the Board cannot disregard the labour relations realities before it. When a group of employees signify that they wish to exercise their right to bargain collectively, and that grouping is seen by the Board as sufficiently conforming to the Board's criteria of appropriateness as a bargaining unit, this Board should not require bargaining in a more comprehensive

unit if to do so would effectively impede the access of that group of employees to any collective bargaining at all.”

15. The Canada Labour Relations Board came to essentially the same conclusion on a review of the same considerations in *Service Office and Retail Workers Union of Canada and Canadian Imperial Bank of Commerce*, [1977] 2 Can. LRBR 99. In that case the Canada Board reversed a longstanding practice and found that a single branch unit of bank employees was both viable and best achieved the purposes of the Code. In *Woodward Stores (Vancouver) Ltd.* [1975] 1 Can. LRBR 114 the British Columbia Labour Relations Board, in certifying a unit of bakery employees at three department stores, observed that “it remains a fact that if the Board were to focus on the long-range enquiry of how collective bargaining should best be carried out in the department store industry, it will likely achieve the short run result that collective bargaining will not be conducted at all”. The British Columbia Board, while putting the parties on notice that it would use its powers to restructure existing bargaining units if a proliferation of small units grew up in the department store industry, opted in favour of facilitating the attainment of collective bargaining for those who chose it in the short term.

16. The National Labour Relations Board, which has had extensive experience with the certification of retail chain operations, adheres to a policy under which a single store in a retail chain is presumptively appropriate for bargaining. Absent a degree of functional integration sufficient to destroy its separate identity the Board will not deny separate groups of employees possessing a community of interest the right to express their wishes concerning collective representation. (See *Haag Drug Co.* 67 LRRM 1289; *Big N Dept. Store* 81 LRRM 1361; *Dayton Hudson Corp.* 94 LRRM 1207; *Erickson Birron Co.* 94 LRRM 1048 and *Renzehis Market Inc.* 99 LRRM 1189).

17. The Board has reviewed both *Fotomat*, *supra*, and *Tip Top Tailors*, *supra*, relied upon by the respondent. The primary issue in both cases is different than that raised in the instant case. In both cases the Board was asked to depart from its standard practice of circumscribing bargaining rights by reference to the municipal boundary and to certify on a broader basis. While the Board refused, and certified for all stores within single municipalities, in both cases, its reasons for doing so lend support to the position of the applicant in this case. In both these cases the Board gave favourable consideration to the pattern of union organizing, as the applicant asks us to do in this case. In both cases, as in the *Goodyear* and *Cybermedix* cases the union organized on a municipal-wide basis. Furthermore, in both cases the Board took into account, as the applicant asks us to take into account in this case, the adverse effect upon employee access to collective bargaining of unit descriptions extending beyond a single municipality. The Board commented in its *Fotomat* decision that any drawbacks associated with the possibility of the respondent having to deal with a multiplicity of bargaining units “are more than outweighed by the restrictive effect that a single bargaining unit would have on the right of the respondent’s employees to decide whether or not they wish to be represented for collective bargaining purposes”. Similarly in its *Tip Top Tailors* decision the Board found that “the extended bargaining area argued for by the respondent raises an insurmountable obstacle to the rights of any of the employees to obtain union representation.”

18. As noted earlier the Board must balance a number of statutory objectives in the exercise of its discretion under section 6(1) of the Act to determine which is the appropriate bargaining unit in any given case. It is clear from a review of the authorities that the blanket policy enunciated in the *Goodyear* decision, *supra*, with respect to the geographic scope of

bargaining units, where an employer conducts essentially similar retail or service store operations at a number of locations in a given geographical area, has given way to a series of considerations which must be made in each case. Viability for purposes of collective bargaining, on an application of community of interest principles and a consideration of the effect of fragmentation, remains a prerequisite for a finding of appropriateness. However, the Board recognizes that there may be more than one appropriate unit in any given case. Where there is more than one appropriate unit the Board will attempt to accommodate the desire of the employees on whose behalf the application has been filed to bargain collectively. It follows that in doing so the Board takes into account the pattern or organization. Furthermore, in making its determination, the Board will be mindful of the precedential impact of its decision. Where, as in the department store sector, collective bargaining has not taken a foothold, the Board will lean towards the bargaining structure which best facilitates organization.

19. What then is the appropriate unit in this case? If the union had organized across all stores within Metropolitan Toronto and if we were dealing with a sector of the retail industry with a history of multi-store bargaining units then, given the common personnel policies and practices and the standardized terms and conditions of employment, we would have been hard pressed not to certify on a municipal-wide basis. However, in this case the union has organized on a single store basis within a sector of the retail industry which has heretofore remained essentially unorganized. In these circumstances we must determine if the single store unit is also appropriate for purposes of collective bargaining and, if it is, find it to be the appropriate unit under section 6(1) of the Act.

20. Notwithstanding the common personnel policies and the standardized terms and conditions of employment we are satisfied on the evidence before us that control over the day to day employment relationship, including the hiring, assigning, and supervising of employees, is maintained at the local level. When reference is had to this fact, to the distance between stores and to the absence of any significant interchange of employees between stores we are further satisfied that the employees at the Bayview Village store enjoy a separate community of interest. We are not satisfied that a single store unit would cause serious disruption to the employer's organization as it relates to the management of its human resources. It is to be noted that regardless of whether the Board determines one store or all stores within Metropolitan Toronto to be the appropriate unit, the structure of collective bargaining could not be made to coincide with the employer's organization. The company has grouped its Metropolitan Toronto stores as well as its stores in Oshawa, Oakville and Newmarket into a single region; its smallest organizational unit beyond that of the single store. The size of the Bayview Village store, as evidenced by the number of employees who work there, when considered in conjunction with their separate community of interest, convinces us that the single store unit would be a stable and viable unit for purposes of collective bargaining. The number of employees at the single store operation in this case is to be contrasted with the two-person kiosks in *Fotomat*, or for that matter, with the number of employees who normally work at a fast food outlet or at a branch of a chartered bank or trust company. We find the respondent's submission that a single store unit should be avoided because it will result in bargaining disruptions which will embroil those employed at its other stores against their wishes, to be without merit. Having regard to the foregoing we are satisfied that the single store unit is an appropriate unit within which to conduct collective bargaining.

21. Having regard to all of the foregoing we find all employees of K-Mart Canada Limited regularly employed at its Bayview Village Shopping Centre store in the Municipality

of Metropolitan Toronto, save and except department managers, persons above the rank of department manager, management trainees, pharmacists, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period to be an appropriate unit for collective bargaining. This unit shall hereinafter be referred to as unit #1.

22. The Board also finds that all persons of K Mart Canada Limited regularly employed at its Bayview Village Shopping Centre store in the Municipality of Metropolitan Toronto for not more than 24 hours per week and students employed during the school vacation period to be a unit of employees appropriate for collective bargaining. This unit is hereinafter referred to as unit #2.

23. The Board is satisfied on the basis of all the evidence before it that more than fifty-five per cent of the employees of the respondent in bargaining unit #1 and in bargaining unit #2 at the time the application was made, were members of the applicant on March 2, 1981, the terminal date fixed for this application and the date which the Board determines, under section 92(2)(j) of *The Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

24. A statement of desire in opposition to this application was filed in this case. The statement bears the signatures of some twenty-five persons who purport to be employees of the respondent. However, only five of the signatures appearing on the statement in opposition to the application coincide with the signatures of persons who also signed membership cards. There are 55 employees in unit #1. 35 of these employees signed membership cards in support of the applicant and only two of these later signed the statement in opposition to the union. In these circumstances we are not prepared to exercise our discretion under section 7(2) of the Act and direct the taking of a representation vote. There are 72 employees in unit #2. 54 of these employees signed into membership in the applicant union. Only 3 of those who had signed into membership later signed the statement in opposition. As with unit #1, in these circumstances we are not prepared to exercise our discretion under section 7(2) of the Act and direct the taking of a representation vote among the employees in unit #2.

25. A certificate will issue to the applicant with respect to bargaining unit #1 and bargaining unit #2.

0638-81-R United Electrical, Radio and Machine Workers of America (UE), Applicant, v. **Magna International Inc.**, Respondent, v. Group of Employees, Objectors.

Bargaining Unit – Certification – Whether single multi-plant unit or separate unit for each of respondent's plants appropriate

BEFORE: George W. Adams, Chairman, and Board Members F. W. Murray and O. Hodges.

***APPEARANCES:** Art Jenkyn and Marie Peters for the applicant; E. L. Stringer, Q.C., J. Hoffman, H. Huber, W. Ertl and G. Zimmer for the respondent; and G. A. Meiklejohn, Maria Melo and Maria Martins for the objectors.*

DECISION OF THE BOARD; September 30, 1981

1. This is an application for certification.
2. The bargaining unit which the applicant claims to be appropriate for collective bargaining consists of all employees of the respondent at its plants in Richmond Hill save and except foremen, those above the rank of foreman, office and sales staff. The respondent asserts that the combined unit is not appropriate and that there should be a separate bargaining unit for each plant.
3. By decision dated July 10, 1981 and in response to the applicant's request for a pre-hearing vote, the Board found that not less than thirty-five per cent of the employees of the respondent in the voting constituency consistent with the applicant's request were members of the applicant at the time the application was made. A vote was therefore directed but because of the differences of the parties with respect to the appropriate bargaining unit, the Board also directed that separate ballot boxes be used for each plant and that those ballot boxes be segregated and sealed until the requisite investigation was made on the issue of the appropriate unit. The vote was taken July 21, 1981.
4. The Automotive Division of the respondent is organized into seven major groups of companies according to product mix and/or geographical location. Annual divisional sales represents about eighty per cent of the respondent's revenues according to its 1980 Annual Report. The three plants in Richmond Hill to which this application pertains are part of a group of eight plants which make up the Trim Group. All of the eight plants come under the same Group General Manager; all eight have the same customers (Chrysler, Ford and General Motors); the employees at all of the plants have comparable skills; and all eight plants produce very similar products.
5. Each of the three Richmond Hill plants take on different corporate forms although there is no dispute that the respondent controls them all. Speedex Manufacturing (hereinafter referred to as "Speedex") is a division of the respondent and constitutes one plant located on Ohio Road in Richmond Hill. It was the first plant to be established in that community and employs about seventy employees. In 1976 another plant was established under the corporate form of Speedstamp Manufacturing Ltd. (hereinafter referred to as "Speedstamp"). It is located about three quarters of a mile from Speedex on Enford Road. It employs approximately sixty employees. In 1978 the third plant was established as Rollstamp Manufacturing Ltd. (hereinafter referred to as "Rollstamp") and it is located one mile and

three quarters from Speedex on Edward Avenue. A number of employees at this location retained counsel and participated in the hearing dealing with bargaining unit configuration. It was their position that three separate bargaining units were the only appropriate units. Rollstamp employs approximately one hundred employees.

6. Each of the plants has a general manager. All three general managers gave evidence. Helmut Huber is the general manager for Rollstamp. He testified that he had authority over rates of pay and the evidence reveals some variation between the three plants. He denied any obligation to consult in this area with head office of the respondent, with his Group Manager or with the other general managers. However, the evidence reveals that wage reviews occur at the same time, at six month intervals, for all three plants. His evidence and that of the other two general managers reveals some variation between the three plants in the area of employer contribution to fringe benefits (a.d. & d. and dental) and differences in shift premium. Huber testified that he and his foreman do the recruitment and hiring. They are also responsible for all other personnel decisions including discipline and promotion. The evidence does, however, reveal assistance from the respondent's Personnel Director. Each general manager is given personnel guidelines in the form of a booklet although this document was not filed with the Board. The reversal of a discharge by Huber at the request of the Director also reveals centralized assistance in this area. The evidence indicates that the general managers of the Trim Group meet at the head office of the respondent on a monthly basis and the Director of Personnel attends these meetings. However, Huber testified the meetings emphasized product quality not labour relations.

7. The respondent attracts the work from the three major automobile companies but the operating units, through the general managers, determine whether the work is suitable for them and, if so, they then bid against each other for that work. Each general manager views his counterpart as a competitor and he is on a bonus arrangement to reinforce this attitude. This organizational approach of the respondent is set out in its 1980 Annual Report at page 3:

- The Operating Unit.

Each operating unit is an autonomous business operation under the control of a General Manager. The General Manager has complete authority and responsibility for the operation of his unit. These decentralized units generally employ approximately 100 persons thereby allowing the General Manager to have close contact with his personnel and control of all matters affecting the efficiency and profitability of his unit.

- The operating units are grouped by products or markets under the direction of a Group Manager. The Group Manager is an individual with proven general management capabilities from on-line experience.

The Group Manager provides support to the individual General Manager who is free to draw upon his experience, council, and advice.

The Group Manager also monitors the implementation of operating policies as outlined by Executive Management.

8. Huber testified that he has never been directed to bid on a job and said that he

determines the price for the job. There is no consultation with the other general managers during the bidding process although the actual submission of the successful quote to the customer is done through the head office. He testified that he has independent authority to purchase equipment but a co-signature of someone from the head office on any cheque over \$5,000 is required. The other two managers testified that they required permission for purchases over either \$7,000 or \$7,500. Each plant is responsible for obtaining its own raw materials. Purchasing power does not appear to be combined by the plants. Each plant is responsible for its own layout. There is no functional relationship between the three plants. None perform functions or work for the other two. They process their own work independently.

9. Each plant has its own bank account. Customers are invoiced in the name of the individual plant and monies paid directly to that operating unit. Each unit is responsible for its own payroll, O.H.I.P. contributions, U.I.C. contributions, and tax deductions. There have been no temporary transfers of employees between the three plants for at least two years. The only permanent transfers have been on the opening of each new plant with the exception of one employee at Rollstamp who wished to work with a friend at the Speedex plant. Each general manager draws up an annual budget for his operating unit. They do not do this in consultation with each other. The budget then goes to the head office.

10. Warner Ertl is the general manager of Speedex. His evidence indicates that the extent of work emanating from any one of the automobile companies varies from plant to plant. His evidence also reveals the independent role of the general manager; the lack of integration between the plants; and the absence of any employee interchange. He admitted that the respondent's Personnel Manager acted as an advisor to him and that a respondent-wide profit sharing plan for employees existed. The plan is mentioned in the respondent's annual report. He testified that the Group General Manager tends to give advice on engineering problems. Gunter Zimmer is the plant manager for Speedstamp. His evidence was very similar to that given by the other two general managers. He claimed responsibility for recruitment, hiring, discipline, promotion and wage increases. He emphasized that he alone determined whether the unit would bid on a job. He testified that the Group General Manager played an important role in major capital acquisitions. He admitted that he was aware of what employees were earning at the other two plants and that the general managers may talk about this subject "once in a while." He also indicated that the Personnel Director may assist in recruitment by checking referees for example.

11. The union introduced evidence that the same independent coffee truck caterer frequents all three plants. It also established that many of the employees at all three plants live in the same community in Toronto. Each plant has its own bus which picks up the employees at the same stops in Toronto. When a bus breaks down, the buses from the other two plants may help out. The same truck may remove parts from each of the three plants. The union also established that as many as twenty-five employees transferred from Speedstamp to Rollstamp when the Rollstamp plant was first opened. Employees at all three plants work a common number of hours and similar shifts; and they receive the same overtime rate and lunch and coffee breaks.

12. Section 6(1) of *The Labour Relations Act* charges the Board with the responsibility of determining "the unit of employees that is appropriate for collective bargaining." The Act, however, does not furnish precise criteria of "appropriateness." Consequently, the Board has

developed certain broad policy guidelines which attempt to balance the right of self-organization guaranteed in section 3 of the Act with the requirements of a viable collective bargaining relationship. There is no lack of cases where the Board has had to choose between single plant or location bargaining units and multiplant or location bargaining units in trying to strike this balance. Generally, unions will advocate the former (since, although they may be more difficult to service, they are generally easier to organize) while employers will generally advocate the latter (since they are generally more difficult to organize but also because larger bargaining units present the employer with a more easily administered and potentially less disruptive collective bargaining relationship). The position of the parties in the instant matter makes this case somewhat exceptional.

13. In determining the appropriateness of bargaining units which include employees at more than one location the Board has outlined certain fundamental criteria as in *Usarco Ltd.*, [1967] OLRB Rep. Sept. 526. (For an excellent and recent review of this see *K-Mart Canada Ltd.*, [1981] OLRB Rep. Sept. 1250). The criteria are: (1) community of interest of the employees; (2) centralization of managerial authority; (3) economic factors; and (4) source of work. The first criterion has been subdivided further to include; the nature of work performed, the conditions of employment, the skills of employees, administration, geographic circumstances, and functional coherence and interdependence. It has been pointed out on numerous occasions that the factors are obviously interdependent and that all factors do not take on the same weight in any given case. Moreover, they must be considered in light of the purpose of the Act which is to facilitate employee access to collective bargaining. The Board has been careful to avoid an overly technical or rational process to collective bargaining structures in order not to frustrate employee wishes. However, the criteria are useful standards for analysis and when applied in the instant case, we get the following;

(1) *Community of Interest*

- (a) Nature of work performed: There is no dispute that employees at all three operations perform the same type of work involving similar operations.
- (b) Conditions of employment: Employees at all plants have similar benefit and profit-sharing schemes, although there are slight differences in A.D. & D. and dental coverage. There is evidence, however, of variances in wages even in the same or similar classifications. On the whole, however, comparable or similar working conditions prevail at all three plants.
- (c) There is dispute that the skills of the employees as a group are similar at all three plants since all plants manufacture similar products.
- (d) Administration: This is the one criterion which most clearly points in a particular direction. Each plant is responsible for administering its own payrolls, benefit schemes and each plant is responsible for its own invoicing and supply of materials. The three workforces are separately administered with no interchange. This separateness may have important implications for employees in the context of collective bargaining. For example, the place of these three plants together in one bargaining unit could work to the disadvantage of lower seniority employees at the youngest plant; indeed, because of the absence of any interchange, employees at one plant may fail to comprehend why they should be affected by the wishes of employees at the other two plants.
- (e) Geographic circumstances: The three plants are located within a mile and a half radius of each other. In the *Usarco* case (*supra*) a distance of two and one-half miles between plants did not prevent the Board from finding a multi-plant bargaining unit to be appropriate.
- (f) Functional coherence and interdependence: It seems clear that there is no functional

integration between the three plants and this factor points strongly to three bargaining units. The evidence discloses that due to the corporate philosophy of the respondent the three plant managers consider themselves to be in competition with each other and manage their affairs accordingly. Further, there is no significant evidence of temporary or permanent employee transfers between plants as noted above.

(2) *Centralization of Managerial Authority*

On this point there is conflicting evidence. While the general managers of each plant view themselves as directing autonomous enterprises and they have given considerable discretion to foster this perception, this is not entirely the case. Exhibit #2 for example, Magna's 1980 Annual Report, shows at page 3 that there is a Group Manager who is responsible for directing the Trim Group. And, while each plant establishes its own budget, individual plant budgets are submitted to the respondent and, without evidence to the contrary, appear to be very limited in nature. It is also clear that a general manager operates under precise financial parameters as indicated by the evidence on capital expenditures of over \$7,000. Finally, even in cases of hiring and firing the evidence suggests limitations on autonomy. An appeal of a discharge at Rollstamp to the respondent's Personnel Director resulted in the Rollstamp manager deciding to re-instate the employee. There was also evidence of the existence of a personnel manual supplied to each general manager. In addition, all Trim managers meet on a monthly basis.

(3) *Economic Factor*

In the *Usarco* case (*supra*) it was held that the creation of separate bargaining units could create an economic disadvantage to the company in that it might impede the transferability of employees between locations. In this case the creation of one bargaining unit has the potential for interference with the respondent's corporate philosophy and its related structure which emphasizes individual operating units. To the extent that the philosophy has been financially successful, its resulting impairment may result in an economic disadvantage.

(4) *Source of Work*

Although each plant is responsible for securing its own supplies the source of work at all plants is the same.

14. It is our view that in the circumstances of this case the balance of factors tilt in the direction of three separate units. From an employee perspective we are very much influenced by the lack of temporary and permanent transfers and the identical nature of the work. Employees would not see work at the other plants as part of any promotional opportunity and may well feel threatened by anything more than plant-wide collective agreement administration. It may be no coincidence that the employees who felt sufficiently strong about the appropriateness of separate units to hire a lawyer and participate in the proceedings were from the most recently established plant. This more local community of interest of employees is accentuated by the respondent's corporate organization and the considerable autonomy granted to individual operating units. While there is important co-ordination by the respondent, labour relations and matters of personnel appear to be related primarily to the local industrial plant.

15. For all of these reasons we find three separate bargaining units to be appropriate for

the purposes of collective bargaining. Having regard to the corporate relationship of these three plants to the respondent, the respondent is properly designated as the employer. The bargaining units appropriate for collective bargaining are therefore described as:

#1. All employees of the respondent at its Rollstamp plant in Richmond Hill save and except foremen, those above the rank of foreman, office and sales staff.

#2. All employees of the respondent at its Steedstamp plant in Richmond Hill save and except foremen, those above the rank of foreman, office and sales staff.

#3. All employees of the respondent at its Speedex plant in Richmond Hill save and except foremen, those above the rank of foreman, office and sales staff.

16. No statement of objections and desire to make representations has been filed with the Board within the time fixed under subsection 2 of section 45 of the Board's Rules of Procedure following the taking of the pre-hearing representation vote pursuant to the Board's direction of July 10, 1981.

17. Having regard to the membership evidence filed by the applicant with the Board, the Board is satisfied that less than thirty-five per cent of the employees of the respondent in bargaining unit #1 were members of the applicant on the date of application.

18. Accordingly, the application is dismissed with respect to bargaining unit #1.

19. Having regard to the membership evidence filed by the applicant with the Board, the Board is satisfied that not less than thirty-five per cent of the employees of the respondent in bargaining unit #2 were members of the applicant on the date of application.

20. The Registrar is therefore instructed to unseal the ballot box pertaining to bargaining unit #2 and cause the ballots to be counted.

21. Having regard to the membership evidence filed by the applicant with the Board, the Board is satisfied that not less than thirty-five per cent of the employees of the respondent in bargaining unit #3 were members of the applicant on the date of application.

22. The Registrar is therefore instructed to unseal the ballot box pertaining to bargaining unit #3 and cause the ballots to be counted.

23. The Registrar will destroy the ballots cast following the expiration of 30 days from the date of this decision unless a statement requesting that the ballots should not be destroyed is received by the Board from one of the parties before the expiration of such 30 day period.

0663-81-R Douglas S. Nelson, Applicant, v. Operative Plasterers' and Cement Masons' International Association of the United States and Canada, Local 172, Respondent, v. **Malcolm Isbister & Co. Ltd.**, Intervener.

Petition – Termination – Working foremen signing petition opposing union – Others signing in his presence – Whether working foreman exercising managerial functions or perceived as such – Whether employer tacitly supported petition by giving time off and allowing meeting on premises – Whether petition voluntary

BEFORE: R. A. Furness, Vice-Chairman, and Board Members C. A. Ballentine and E. J. Brady.

APPEARANCES: Douglas S. Nelson for the applicant; Susan Stewart and Arthur Enman for the respondent; R. Finkel for the intervener.

DECISION OF R. A. FURNESS, VICE-CHAIRMAN, AND BOARD MEMBER E. J. BRADY; September 24, 1981

1. The name: "Operative Plasterers & Cement Masons Local 172, Toronto" appearing in the style of cause of this application as the name of the respondent is amended to read: "Operative Plasterers' and Cement Masons' International Association of the United States and Canada, Local 172".
2. The applicant has applied to the Board under section 49 of *The Labour Relations Act* for a declaration that the respondent no longer represents the employees in the bargaining unit for which it is the bargaining agent.
3. The parties agreed that the bargaining unit was properly described as "all employees of the respondent in the Province of Ontario engaged in steeplejack and masonry restoration work in the industrial, commercial and institutional sector of the construction industry, save and except non-working foremen and persons above the rank of non-working foreman."
4. At the commencement of the hearing the applicant and the intervener informed the Board that, a few minutes earlier, they had received allegations of improper or irregular conduct which had been made by the respondent and which alleged a violation of section 56 of the Act. It was not alleged that the respondent had not acted with due diligence in filing these allegations with the Board. The respondent informed the Board that while it did not intend to adduce any evidence with respect to its allegations it would be asking questions in cross-examination which would endeavour to establish that the statement of desire in support of this application was not a voluntary signification of the employees who signed it. It was the position of the respondent that questions in cross-examination would refer to matters raised in its allegations. After considering their positions the applicant informed the Board that it was ready to proceed with the application, and the intervener asked for an adjournment. It was the position of counsel for the intervener that she was unable to refute the allegations because her client was not present and that it would be a breach of natural justice if the Board proceeded with the hearing. The Board ruled that it would proceed with the hearing, and that if the intervener desired to adduce evidence before the Board, the hearing would be adjourned in order to permit the intervener to call such evidence. The only evidence before the Board was

the evidence of the applicant, Douglas S. Nelson, and counsel for the intervener informed the Board that she did not wish to call any evidence. The Board then proceeded to hear the representations of the parties on the evidence before it.

5. This application was filed on June 23, 1981. A collective agreement was in force between the Steeplejack and Masonry Restoration Contractors Association, the employer bargaining agency, and the Operative Plasterers' and Cement Masons' International Association of the United States and Canada Local 172, the employee bargaining agency, which was in effect from May 1, 1978, until April 30, 1980. This collective agreement states in article 3.01:

The Employer recognizes Local 172 as the sole and exclusive bargaining agent for all Employees save and except those above the rank of working foreman.

Article 14.01 states:

The jurisdictional area of this Agreement shall be the Province of Ontario.

Although there is no reference in this collective agreement to the industrial, commercial and institutional sector of the construction industry, it was common ground among the parties that this collective agreement covered the industrial, commercial and institutional sector of the construction industry. It was agreed by the parties that a new collective agreement between the employer and employee bargaining agencies was not signed until July 14, 1981, some fourteen months after the expiration of the previous collective agreement on April 30, 1980. The respondent informed the Board that the bargaining for and the execution of the new collective agreement was delayed by various applications for certification before the Board with respect to certain employees who were employed by employers who would be covered by the new collective agreement and that such applications were finally disposed of shortly before July 14, 1981. These facts were not disputed by the other parties. It was also agreed that two interim wage increases had been agreed to and put into effect by the employer and employee bargaining agencies. By its terms, the new collective agreement became effective from May 1, 1980, and remains in effect until April 30, 1982. The parties agreed that the employee bargaining agency gave notice to bargain for a new collective agreement to the employer bargaining agency in December of 1979 or January of 1980 and that the Minister of Labour appointed a conciliation officer in April of 1980. Having regard to the foregoing facts and to the provisions of section 53(2) of the Act, the Board finds that this application is timely.

6. The statement of desire which was filed in support of this application contained the signatures of seven of the ten persons who were on the list of employees for the purpose of the count. The Board therefore inquired into the origination, preparation and circulation of the statement of desire.

7. Douglas Nelson composed the heading on the statement of desire and his girl friend typed the heading on a plain sheet of paper. Mr. Nelson obtained the signatures on the statement of desire by visiting the residence of one employee and by visiting a job-site in North Bay. The signatures which were obtained in North Bay were obtained during working hours

when Mr. Nelson absented himself from work. After he had decided to take the day off work, Mr. Nelson telephoned his boss, Bill Isbister, and informed him that he had taken the day off to take care of negotiations for the employees. Mr. Nelson also absented himself from his job on other occasions and gave his boss the same reason. None of the signatures were obtained in the presence of a member of the intervener's managerial staff. However, on the job site a working foreman, who is in the bargaining unit, signed the statement of desire and was present while other signatures were obtained.

8. The employees of the intervener had previously been aware of an attempt by a Canadian trade union to displace the respondent as the bargaining agent. This attempt was generally unsuccessful. However, Mr. Nelson and other employees approached Bill Isbister to see if the intervener could discontinue the payment of dues to the respondent. The employees were subsequently told that this was not possible. The employees arranged a meeting with a representative of an insurance company to discuss a package of benefits. Meetings were held on the intervener's premises with no one from management present. A meeting was also held by the employees in the bargaining unit on the intervener's premises on May 2, 1981. No one from management was present. At this meeting the employees discussed disassociating themselves from the respondent. There is nothing before the Board to indicate that management was aware of what was being discussed at the meeting on May 2, 1981.

9. The respondent argued that the Board should dismiss this application because the working foreman has supervisory authority and was involved all the way through the progress of the statement of desire. In addition, it was also argued by the respondent that the intervener was aware of what was being discussed at the meeting on May 2, 1981, and that Mr. Nelson's ability to obtain time off in order to circulate the statement of desire constituted tacit approval of the actions of Mr. Nelson in making this application.

10. The evidence before the Board does not establish that the intervener or any person acting on his behalf violated the provisions of section 56 of the Act. The allegation that the intervener or any person acting on his behalf violated the provisions of section 56 is dismissed.

11. The position of a working foreman in the construction industry was referred to in *A. N. Shaw & Sons (Eastern) Ltd.*, [1980] OLRB Rep. Oct. 1347. In this application there is no evidence before the Board that the working foreman either exercised managerial authority or was regarded by the employees as being able to affect their employment relationship with the intervener. In addition, unlike the *A. N. Shaw* case, *supra*, the statement of desire was originated by a fourth year apprentice and not by a working foreman. While it is true that the employees conducted meetings on the intervener's premises as a matter of convenience, there is no suggestion in the evidence before the Board that management either played any role in the origination, preparation and circulation of the statement of desire or was aware of what was being discussed on its premises. The only evidence before the Board was given by Mr. Nelson, who was an articulate and credible witness. We do not agree with the respondent's characterization of Mr. Nelson's "ability to obtain time off in order to circulate the statement of desire". In our view, Mr. Nelson took the time off and then informed Bill Isbister of the fact together with a general and non-specific reason for his absence. Mr. Nelson, in response to the argument of the respondent, wondered whether he was expected by the respondent to lie to the intervener. In our opinion, there is no requirement for Mr. Nelson to lie to the intervener.

12. We are satisfied on the balance of probabilities that the statement of desire which

was filed in support of this application represents the voluntary wishes of the employees who signed it. We are further satisfied that not less than forty-five per cent of the employees of Malcolm Isbister & Co. Ltd. in the bargaining unit, at the time the application was made, had voluntarily signified in writing that they no longer wished to be represented by the respondent trade union on July 3, 1981, the terminal date fixed for this application and the date which the Board determines, under section 92(2)(j) of *The Labour Relations Act*, to be the time for the purpose of ascertaining the number of persons who have voluntarily signified in writing that they no longer wish to be represented by the respondent trade union under section 49(3) of the said Act.

13. We direct that a representation vote be taken of the employees of Malcolm Isbister & Co. Ltd. Those eligible to vote are all employees of Malcolm Isbister & Co. Ltd. in the Province of Ontario engaged in steeplejack and masonry restoration work in the industrial, commercial and institutional sector of the construction industry, save and except non-working foremen and persons above the rank of non-working foreman on the date hereof who do not voluntarily terminate their employment or who are not discharged for cause between the date hereof and the date the vote is taken.

14. Voters will be asked to indicate whether or not they wish to be represented by the respondent in their employment relations with Malcolm Isbister & Co. Ltd.

15. The matter is referred to the Registrar.

DECISION OF BOARD MEMBER C.A. BALLENTINE;

1. I dissent from the majority decision in this case, on the grounds that the voluntariness of the statement of desire is suspect.

2. I agree with counsel for the respondent union, that the Board should dismiss this application, because the working foremen have supervisory authority and were involved throughout the progress of the petition. In the case of *A. N. Shaw & Sons Eastern Ltd.*, [1980] OLRB Rep. Oct. at p. 1350 in a dissent on that case, I set out my views on the status of a construction foreman. I also agree with union counsel's submission that the company's top management gave tacit approval to the circulation of the petition, by allowing Mr. Nelson time off and by providing the company premises for a meeting on Saturday, May 2nd.

3. From the evidence of Douglas Nelson, it is obvious that several working foremen played an important role in the organization and circulation of the statement of desire. Raymond Samson had made most of the arrangements for the meeting on May 2nd. At the North Bay project Mr. Nelson said the workers were expecting him as he had spoken to Dan Bertram, the working foreman, previously.

4. I cannot accept a view that top management wouldn't be aware of the campaign to get rid of the Union. Mr. Nelson under cross-examination admitted that Wm. Isbister, the manager of the Company, was on the premises in a back room the day of the May 2nd meeting. Mr. Isbister, on being invited, attended the meeting and was requested to withhold the dues check off. Mr. Nelson stated that Mr. Isbister said he would check into the situation at the meeting and he did in fact, subsequently, temporarily withhold the check off. Mr. Nelson's own evidence was that he had no problem getting time off work to get 5 signatures and also

attended at the Labour Board on at least 2 occasions in processing this application to terminate the union's bargaining rights.

5. In the *Ontario Hospital Association (Blue Cross)* [1980] OLRB Rep. Dec. 1759, the Board dismissed the application under section 49 on the grounds that the statement of desire was not voluntary. One of the contributing factors to the dismissal was that Mrs. Ali, one of the petitioners, requested a day off from the Company to assist her husband in the purchasing of a new car. It was revealed, in evidence at the hearing in that case, that Mrs. Ali spent most of that day collecting signatures in the Company cafeteria. The Board in that case stated in paragraph 39 at page 1772:

"Although it is apparent to the Board that Mrs. Ali acted that day without the authority of management, that is not the most probable perception that employees would have had."

In the instant case we have the petitioner who is purported to be a fourth term apprentice, driving approximately 200 miles to North Bay, on a working day and then have 5 people sign the petition, including the working foreman, during working hours. The most probable perception that the employees would have, would be that Mr. Nelson was acting with the full authority of management.

6. It is my view that Douglas Nelson was set up to get rid of the Union. I am of the opinion that the statement of desire does not express the true wishes of the employees and therefore that this application should be dismissed.

1021-81-R Ontario Nurses' Association, Applicant, v. Manitoulin Nursing Home, Respondent.

Employee – Practice and Procedure – Whether registered nurses exercising managerial functions – Whether supervisory duties emanating from professional training or managerial authority – No dispute as to duties and responsibilities – Board not following practice of appointing officer

BEFORE: R. O. MacDowell, Vice-Chairman, and Board Members W. Gibson and O. Hodges.

APPEARANCES: *Dan Anderson for the applicant; W. E. Graham, L. Williams and H. Johnson for the respondent.*

DECISION OF THE BOARD; September 2, 1981

1. This is an application for certification.
2. The Board finds that the applicant is a trade union within the meaning of section 1(1)(n) of *The Labour Relations Act*.

3. There are five individuals potentially affected by this application. All five are registered nurses, employed by the respondent on a part-time basis. These five individuals comprise the respondent's nursing staff. The respondent contends that none of them are "employees" within the meaning of *The Labour Relations Act*, because they all exercise "managerial functions". In consequence, the respondent alleges that none of its nursing staff are entitled to participate in collective bargaining.

4. The respondent employer's Reply to the Application for Certification did not raise any issue concerning the employee status of the members of its nursing staff. There were no particulars concerning their duties and responsibilities or the functions which the respondent claimed were of a "managerial" character. In the circumstances, it seemed appropriate to ask the respondent to set out the facts upon which it intended to rely to support its position, and to determine whether any of those facts were disputed by the applicant. There was no point in following the Board's usual practice of appointing a Labour Relations Officer, or undertaking a protracted inquiry, if the nature of the nurses' duties was not in dispute. Nor was the issue raised by the respondent a novel one. There have been literally dozens of cases involving the status of nurses employed by health units, hospitals, and nursing homes (see, for example: *Re Peterborough Civil Hospital*, [1973] OLRB Rep. Mar. 154; *Essex Health Association*, [1970] OLRB Rep. Nov. 824; *The Cottage Hospital*, [1980] OLRB Rep. Mar. 304; *Toronto East General and Orthopaedic Hospital*, [1974] OLRB Rep. Oct. 671 and the numerous cases noted in Sack and Levinson *Ontario Labour Relations Board Practice* at page 33 of the text and page 13 of the cumulative supplement). It would serve little purpose to undertake a protracted inquiry, substantially delaying the result in these proceedings, if the facts were not in dispute, and the Board was able on the basis thereof to render an immediate decision on the question of whether, in its opinion, the individuals affected by this application exercise managerial functions.

5. The statutory provision relevant to this matter is as follows:

1. (3) Subject to section 80, for the purposes of this Act, no person shall be deemed to be an employee.

(b) who, *in the opinion of the Board*, exercises managerial functions or is employed in a confidential capacity in matters relating to labour relations.

6. Each of the cases to which we have referred, of course, turns on its particular facts; however, their general thrust is that the Board must be careful when assessing a professional person such as a registered nurse, to distinguish between duties which emanate from that individual's professional training, and those which in fact reflect managerial authority. In *Essex Health Association (supra)* the Board noted at page 825:

3. Professional or semi-professional employees such as head nurses and nurses have a different relationship with management in matters falling within their professional competence and the performance of their professional duties than employees engaged in production in other industries. While the criteria applied to determine whether professional or semi-professional persons exercise managerial functions are basically the same as with persons concerned with production, in applying such

criteria a distinction must be made between functions which are of a managerial nature and functions which are inherent in the exercise of such persons' professional or technical skills. While nurses may give certain directions to others, e.g. Orderlies, in the exercise of their professional skills, these directions are not dissimilar to the directions given by a journeyman to an apprentice in other crafts. Again, the reporting functions exercised by head nurses in this case may be likened to the reports one may expect from a journeyman concerning the progress of the apprentice. The head nurses report but they do not initiate independent action with respect to the employment status of others who must follow the assignments given by the head nurse. It is also interesting to note that the assistant head nurses, whom the parties have agreed are included in the bargaining unit, perform substantially the same functions as the head nurse on the shifts not worked by the head nurse.

7. In *Peterborough Civic Hospital*, [1973] OLRB Rep. Mar. 154, the Board further commented on factors relevant to the assessment of the employee status of a registered nurse, in a long passage to which we might usefully refer.

"9. Determinations in the white collar area have also become more difficult. We have indicated we must be cautious in using the industrial model to make assessments about non-industrial or white collar situations. However, we now have greater experience with the white collar section and we are able to draw on our specific experience in that area. In the non-industrial area we are now finding that the decision-making process and control of employees varies considerably. Like the industrial situation, personnel policies are usually developed by a personnel department, but the elements of management are usually dispersed throughout the organization. Real control and managerial functions are easily ascertained at the top of the management pyramid, but at the lower levels managerial functions are filtered through the organization in such a way that they are not easily ascertainable. Many non-industrial situations have developed a collegial decision-making process which reflects that type of organization. For example, technicians or draftsmen may work with an engineer in a white collar situation in such a manner that they participate in the decision-making process. Again, the nature of their work is such that they move from project to project so that it is difficult to ascertain who controls the employees; see e.g. *The Hydro-Electric Power Commission of Ontario* (1969) August OLRB Mthly. Rep. 669.

10. This type of situation also occurs in hospitals. As indicated in this case there may be a team approach to patient care. Nurses will participate in the decision-making processes which are relevant in the hospital's operations. Nurses are highly trained, and the combination of their training and experience permits them a consultative role which differs from employees in the industrial context; see *Ajax and Pickering General Hospital* (1970) February OLRB Mthly. Rep. 1283. It would be incorrect to view such a role as managerial and thereby render nurses managerial within the meaning of *The Labour Relations Act*.

11. Head nurses stand at the very boundary between the employee group and management. The head nurse in this particular case is indicative of the role usually played by head nurses. Head nurses form a link or a liaison between management and other employees; they are in charge of a hospital floor and therefore assume many different functions. For example, a head nurse is still involved in patient care. Because of her experience she may be called upon by other nurses prior to consulting the doctor. She may also be required to assist in the orientation of nurses who are new to that particular floor. Neither of these roles is a management function, but is merely the function of the training and experience of head nurses. In addition, the head nurse carries out limited administrative duties. For example, she co-ordinates the policies of the hospital on her floor with respect to staffing. She sees that the scheduling and arranging of personnel is such that there is adequate coverage for patients. This scheduling is carried out in correspondence with a predetermined policy and the head nurse is merely implementing policies decided at a higher level. This implementation should not be confused with the decision-making or control function that goes hand in hand with management.

12. Also, the head nurse forms a conduit between the general staff on her floor and management, or to put it another way she has a reporting function. In this function she is a liaison between management and other employees; she enables management to "keep its ear to the ground" and in touch with the daily operations and functions of the hospital, and at the same time she is a part of the vehicle for management to convey policies and decisions to other employees. Again, this reporting function should not be confused with the exercise of managerial duties. The duty to manage and the concept of a managerial function requires a corresponding and correlative responsibility. The head nurse in this case does not have that type of responsibility that one envisions as being managerial. She is not akin to the early foreman that we have spoken about, nor does she have duties that are incompatible with placing her in the bargaining unit. There is no conflict between the duty that she owes to management and her being a member of the bargaining unit. . ."

8. The general comments are equally apposite in the present context, for if the Board is not careful to distinguish incidental supervisory or coordinating functions consequent upon an individual's skill, training, experience, or seniority, many highly skilled, professional, technical or senior employees might be deprived of the right to engage in collective bargaining. It is worth recalling the purpose of the managerial exclusion itself. That purpose was succinctly stated by the British Columbia Labour Relations Board in *Corporation of the District of Burnaby*, [1974] 1 Can. LRBR at page 3:

"The explanation for this management exemption is not hard to find. The point of the statute is to foster collective bargaining between employers and unions. True bargaining requires an arm's length relationship between the two sides, each of which is organized in a manner which will best achieve its interests. For the more efficient

operation of the enterprise, the employer establishes a hierarchy in which some people at the top have the authority to direct the efforts of those nearer the bottom. To achieve countervailing power to that of the employer, employees organize themselves into unions in which the bargaining power of all is shared and exercised in the way the majority directs. Somewhere in between these competing groups are those in management — on the one hand an employee equally dependent on the enterprise for his livelihood, but on the other hand wielding substantial power over the working life of those employees under him. The British Columbia Legislature, following the path of all other labour legislation in North America, has decided that in the tug of these two competing forces, management must be assigned to the side of the employer.

The rationale for that decision is obvious as far as the employer is concerned. It wants to have the undivided loyalty of its senior people who are responsible for seeing that the work gets done and the terms of the collective agreement are adhered to. Their decisions can have important effects on the economic lives of employees, e.g., individuals who may be disciplined for “cause” or passed over for promotion on the grounds of their “ability”. The employer does not want management’s identification in the activities of the employees’ union.

More subtly, but equally as important, the exclusion of management from bargaining units is designed for the protection of employee organizations as well. An historic and still current problem in securing effective representation for employees in the face of employer power is the effort of some employers to sponsor and dominate weak and dependent unions. The logical agent for the effort is management personnel. One way this happens is if members of management use their authority in the work place to interfere with the choice of a representative by their employees. However, the same result could happen quite innocently. A great many members of management are promoted from the ranks of employees. Those with the talents and seniority for that promotion are also the very people who will likely rise in union ranks as well. In the absence of legal controls, the leadership of a union could all be drawn from the senior management with whom they are supposed to be bargaining. If an arm’s length relationship between employer and union is to be preserved for the benefit of employees, the law has directed that a person must leave the bargaining unit when he is promoted to a position where he exercises management functions over it.”

9. What functions do the nurses exercise in the instant case? Do they make decisions which affect the economic lives of their fellow employees (non-nursing staff) thereby raising a potential conflict of interest with them? For example, do they have the right to hire, fire, promote, demote, grant wage increases or discipline employees? All of these are indications of managerial authority, and the exercise of such authority would clearly be incompatible with participation in trade union activities as an ordinary member of the bargaining unit. (In addressing this issue we will assume, without finding, that the respondent’s assertions of fact are correct).

10. The respondent told the Board that the initial selection and hiring of nurses aides and health care aides is done by the Director of Nursing. The part-time nursing staff may assist in the employee orientation and may give a verbal opinion as to how the new employee is doing; but there are no instances in which such employees have not been retained, and in any event, that decision clearly rests with the Director of Nursing. The nursing staff have never been involved in disciplining employees. In two instances, an incident was reported to the Director of Nursing (a failure of an employee to appear for work as scheduled, and an employee apparently intoxicated) and it was the Director of Nursing who issued the written warning. There have been no other incidents of discipline in which the nurses were even remotely involved. Nor are they involved in scheduling or granting time off. Employees work in accordance with a master rotation and, if they are unable to switch shifts to accommodate their needs, they approach the Director of Nursing for a leave of absence. Nurses have never had any involvement with collective bargaining or the grievance procedure. They have no impact on employee salaries. They do fill out a pro-forma "evaluation" form but these are submitted to the Director of Nursing for her consideration. The respondent could cite no instance of the kind of adverse impact on employees being "evaluated" which would give rise to the conflict of interest which section 1(3)(b) was designed to avoid. In short, while the part-time nursing staff no doubt has a special role to play on the "health care team" and performs certain limited supervisory and coordinating functions associated with their professional training, it cannot be said that the entire nursing staff "exercises managerial functions" vis-a-vis the non-registered health care employees and must therefore be excluded from collective bargaining.

11. Assuming, without finding, that the respondent's statement of facts is correct, it is the opinion of the Board that the employees affected by this application do not exercise managerial functions within the meaning of section 1(3)(b) of *The Labour Relations Act*. Of course, if the duties and responsibilities of one or more of the nurses change, so that they do, in fact, begin to exercise real managerial authority over their fellow employees, then either party is free to seek a clarification of their status pursuant to section 95(2) of the Act.

12. Having regard to the representations of the parties the Board finds that all registered and graduate nurses employed in a nursing capacity by Manitoulin Nursing Home, Gore Bay, Ontario, save and except the Director of Nursing and persons above the rank of Director of Nursing, constitute a unit of employees appropriate for collective bargaining.

13. The Board further finds that more than fifty-five per cent of the employees in the bargaining unit, at the time the application was made, were members of the applicant on August 20, 1981, the terminal date fixed for this application and the date which the Board determines pursuant to section 92(2)(j) of the Act, to be the time for determining membership under section 7(1) of the Act.

14. A certificate will issue to the applicant.

0560-81-R Labourers' International Union of North America, Local 183, Applicant, v. **Matterhorn Construction (Hamilton) Limited** and/or Highrise Crane and Rental Limited, Respondents.

Bargaining Unit – Construction Industry – Application relating to concrete forming construction in all sectors except 1C1 – Applicant's bargaining rights historically limited to residential sector – Minister's designation excluding employees engaged in concrete forming construction – Whether applicant an affiliated bargaining agency – Whether entitled to rights outside residential sector

BEFORE: N. B. Satterfield, Vice-Chairman and Board Members W. Gibson and H. Kobryn.

APPEARANCES: *B. Fishbein and L. Castaldo for the applicant; Gary C. C. Walker for the respondents.*

DECISION OF THE BOARD; September 21, 1981

1. This is an application for certification falling under the construction industry provisions of *The Labour Relations Act*.
2. The Board finds that the applicant is a trade union within the meaning of section 1(1)(n) of *The Labour Relations Act*.
3. Immediately following the making of this application, the applicant, by letter from its counsel requested the Board to apply section 1(4) and/or section 55 of the Act to its application. Accordingly, the application was listed for hearing but did not proceed to hearing on the date originally scheduled because the parties had not received proper notice of the hearing. It was relisted for hearing a week later and at that hearing the respondent Matterhorn Construction (Hamilton) Limited ("Matterhorn") was represented by counsel only for the purpose of seeking an adjournment of the hearing because of alleged, inadequate notice. The respondent Highrise Crane and Rental Limited ("Highrise") joined in this request, but the applicant ("Local 183") refused to consent to an adjournment. The Board, after hearing and considering the representations of the parties on the request for adjournment granted the request in respect of the sections 1(4) and/or 55 issues and, at the request of counsel for Local 183, proceeded with the application for certification insofar as it applied to Highrise. In so doing, the Board accepted the argument of counsel for Local 183 that the reply from Highrise asserted that it was the employer of the employees in question, it would be possible for the Board to determine an appropriate bargaining unit in respect of Highrise and, if the applicant had the requisite membership support, the Board could grant it interim certification pursuant to section 6(a) of the Act for that unit pending final resolution of the status of Matterhorn.
4. The bargaining unit being sought by Local 183 is described in its application as:

"All employees of the respondent engaged in concrete forming construction in all sectors of the construction industry, save and except the industrial, commercial and institutional sector of the construction industry, in Ontario Labour Relations Board geographic area #8, save and except for non-working foremen, and persons above the rank of non-working foreman."

Local 183 and Highrise are agreed that this is an appropriate unit for collective bargaining and that, on the date of application, the unit included persons employed as construction labourers, rodmen, carpenters, cement masons and operating engineers. The list of employees filed by Highrise includes persons in all of those classifications. For reasons given orally at the hearing, the Board expressed doubt as to whether the unit to which the parties had agreed was an appropriate one and it reserved its discretion on that question. The question of appropriateness is the only obstacle in the way of a certificate issuing to Local 183 since, no matter how the bargaining unit is ultimately described, the Board is satisfied on the basis of all the evidence before it that more than fifty-five per cent of the employees of Highrise Crane and Rental Limited at the time the application was made, were members of the applicant on June 22nd, 1981, the terminal date fixed for this application and the date which the Board determines, under section 92(2)(j) of *The Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

5. Since this application for certification is one coming under the construction industry provisions of the Act, it must be made pursuant to section 131(a) and applications for certification brought under that section must be brought under one of subsections 1, 3 or 5. Only trade unions which are represented in collective bargaining by an employee bargaining agency have access to subsections 1 and 3. In respect of those two subsections, the Board has determined that section 131a offers such trade unions the option of deciding whether its application relates to the industrial, commercial and institutional sector of the construction industry and is, therefore, made under subsection 1 or that it does not relate to that sector and is made under subsection 3 in respect of all sectors other than the industrial, commercial and institutional sector. See *Colonist Homes Ltd.*, [1980] OLRB Rep. Dec. 1729, cited with approval in *Pelar Construction Ltd.*, [1981] OLRB Rep. Feb. 210, a decision dealing with an application in which Local 183 was the applicant. Since, in the case at hand, Local 183 has adopted the language of subsection 3 in describing the bargaining unit which it is seeking as relating to “. . . all sectors of the construction industry, save and except the industrial, commercial and institutional sector . . .”, it would appear that it has exercised its option to bring its application under subsection 3 of section 131a of the Act. Finally and on the other hand, subsection 5 of section 131a is available to those trade unions which are not represented in collective bargaining by an employee bargaining agency.

6. Local 183 is an affiliated bargaining agent of the Labourers Employee Bargaining Agency as designated pursuant to section 127(1) of the Act and is represented in collective bargaining in the industrial, commercial and institutional sector of the construction industry by the labourers employee bargaining agency. That designation deals specifically with concrete forming in the following terms:

“For purposes of clarity, it should be noted that notwithstanding the fact that locals set out in paragraph 3 above are affiliated bargaining agents within the meaning of clause *a* of section 125, certain of them have or may acquire bargaining rights, or are, or may become bound by, certain collective agreements affecting all sectors of the construction industry covering all employees engaged in concrete forming construction, namely the agreement between *Locals 183 and 1081*, and the Ontario Form Work Association and between Local 493 and Romm Construction Company Limited, whereby they represent employees who do not commonly bargain separately and apart from other employees.

Therefore, with respect to bargaining on behalf of employees of members of the Ontario Form Work Association and Romm Construction Company Limited, and such other employers for whom any of the local unions have or may acquire bargaining rights for all employees engaged in concrete forming construction, *such locals are not affiliated bargaining agents within the meaning of clause a of section 125, nor are they included in or covered by this designation under subsection 1 of section 127, nor are they or the said collective agreements and bargaining thereunder affected by section 133 of The Labour Relations Act.* Pursuant to subsection 2 of section 127 of *The Labour Relations Act* I hereby exclude from this designation the bargaining relationship between the Formwork Council of Ontario and the Ontario Formwork Association.”
(emphasis added)

By this reference, the Minister in designating the employee bargaining agency under section 127(1) of the Act has exercised his discretionary powers under section 127(2) to exclude employees engaged in concrete forming construction from the employee bargaining agency's representation rights. There are three locals of the Labourers' International Union of North America named in the reference quoted above as representing employees in concrete forming construction, one of which is Local 183. Thus Local 183 is not a trade union represented by an employee bargaining agency when it comes to employees engaged in concrete forming construction.

7. Since Local 183 is not a trade union represented by an employee bargaining agency in respect of employees engaged in concrete forming construction, it is not a union which has the option of deciding, when it is applying for certification in respect of employees engaged in concrete forming construction as referred to in the designation of the labourers employee bargaining agency, whether its application relates to the industrial, commercial and institutional sector of the construction industry and, therefore, comes under subsection 1 of section 131a or does not relate to that sector and comes under subsection 3. Therefore, the only avenue open to Local 183 when it is seeking bargaining rights for employees engaged in concrete forming construction is subsection 5 of section 131a of the Act. Accordingly, the Board determines that this application is made pursuant to subsection 5 of section 131a. It is patently clear that subsection 5 contains no reference to construction industry sectors. Thus it remains for the Board, in dealing with applications for certification coming within that subsection, to determine whether bargaining rights will be granted with or without sectoral reference. In other words, it leaves the Board in the same position in respect of these applications as it was prior to the introduction of section 131a into the Act. Prior to the amendment which introduced that section, the Board consistently avoided sectoral determinations in the context of certification proceedings for the reasons set out in its decision in *Lyle West Electric Limited*, [1978] OLRB Rep. Nov. 999. In its *Pelar* decision, *supra*, the Board expressed the view that these reasons still have validity under section 131a in following terms:

“In addition to the reasons based on the legislative history of section 131a given above, we are also of the view that there are good labour relations reasons for avoiding such sectoral determinations in the context of certification proceedings. In this regard, we are of the view that the concern expressed by the Board in the *Lyle West* case about the delay

caused by such determinations is still a very real concern. In this regard, our concern over the delay caused by sectoral determinations is similar to our concern for the delay caused by jurisdictional determinations. With respect to jurisdictional determinations, the Board has on numerous occasions said that that is something more properly dealt with under section 81 of the Act than in the context of a certification proceeding.”

8. Prior to section 131a of the Act coming into force, the Board granted Local 183 bargaining units within Board area #8 in three different forms, one of which dealt with employees engaged in concrete forming construction. That unit was described in the following terms:

“All employees of the respondent engaged in concrete forming on residential building projects [in Board area #8], save and except non-working foremen and persons above the rank of non-working foreman.”

Since this was a unit which the Board has previously found to be appropriate for collective bargaining purposes and since Local 183 and Highrise agree that this application affects employees of Highrise engaged in concrete forming construction, the Board sees no reason why it should depart from its prior policy of granting Local 183 the unit described immediately above.

9. Accordingly, pursuant to the Board’s discretion under section 6(1a) of the Act and pending determination of the status of Matterhorn Construction (Hamilton) Limited, the Board grants interim certification to the applicant as the exclusive bargaining agent for all employees of Highrise Crane and Rental Limited engaged in concrete forming on residential building projects in Metropolitan Toronto, The Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.

10. A formal certificate must await the final determination of the status of Matterhorn Construction (Hamilton) Limited. In that respect, the Registrar is directed to list this application for hearing for the purpose of receiving the evidence and submissions of the parties on the applicant’s allegation that there has been a sale of business within the meaning of section 55 of the Act between the two respondents or, in the alternative, they should be treated as one employer for the purposes of the Act, pursuant to section 1(4).

0254-81-U W. Millben W. Osborne, M. Fields, R. Desbien, B. Segee, L. Powers, T. Goddard, Complainants, v. **Ontario Taxi Association 1688** Canadian Labour Congress and its members L. Laham, S. Wier, R. St. Jacques, D. Boughner, Respondents

Fraud – Membership Evidence – Section 12 – Termination – Whether union discriminating against blacks – Signature forged on membership card – Whether fraud perpetrated on Board – Union having burden to satisfy Board why discretion should not be used to terminate

BEFORE: Ian Springate, Vice-Chairman and Board Members B. Lee and W.H. Wightman.

APPEARANCES: *Tullio Meconi for the complainants; Jeffrey Egner and Jack McDowell for the respondents.*

DECISION OF THE BOARD; September 16, 1981

1. This matter was filed with the Board as a complaint under section 79 of *The Labour Relations Act* alleging a violation of sections 12, 60, 60a, 61, 62 and 50 of the Act.

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3. The Ontario Taxi Association 1688 Canadian Labour Congress ("The Union") was certified by the Board on March 16, 1981 to represent both a bargaining unit of owner-operators of Windsor Airline Limousine Services Limited carrying on business as Veteran Cab Company ("Veteran Cab Company") as well as for a unit of drivers in the employ of the company. The union originally filed separate applications for certification with respect to the two units, (File Nos. 1275-79-R and 1391-79-R) but the Board consolidated the two applications. It is clear that a single organizing campaign was conducted with respect to both bargaining units. The complainants in this matter are all drivers or owner-operators with Veteran Cab Company.

4. The complaint as filed referred to a number of alleged improper actions on the part of the union. At the commencement of the hearing, however, counsel for the complainants indicated that he would be relying on only two of the allegations, namely that the union discriminated against black employees, and that the union obtained its membership evidence by fraud.

5. Although this matter was filed as a section 79 complaint, it was in fact clearly meant to be an application to terminate the union's bargaining rights and it was on this basis that it was dealt with before the Board.

6. Section 12 of *The Labour Relations Act* states that the Board shall not certify a union that discriminates against any person because of his race, creed, colour, nationality, ancestry or place of origin. Counsel for the union contended that since the union had already been certified at the time of the events giving rise to the allegation of discrimination, this section could not properly be pleaded in these proceedings. The Board, however, reserved on this contention and heard the evidence of the parties with respect to the alleged discrimination.

7. The claim of alleged racial discrimination arises out of an exchange between Mr. Millben, a black owner-operator, and Mr. D. Boughner, a white driver who at the time was serving on the union's organizing committee. From the very commencement of the union's organizing campaign in Windsor, Mr. Millben had spoken out against the union in very strong terms and had indicated that he did not intend to become a union member. Sometime in March of 1981, Mr. Millben asked Mr. Boughner why he had never been asked to join the union to which Mr. Boughner replied that "it would be like asking the K.K.K. to join the N.A.A.C.P." This reference to the Ku Klux Klan understandably upset Mr. Millben, and led him to the conclusion that the union was discriminating against blacks.

8. Mr. Boughner testified that his response to Mr. Millben was meant to be an analogy which Mr. Millben could understand, and that he had only been trying to indicate to Mr. Millben that he had not been asked to join the union because of his opposition to it. Even if this was in fact the case, Mr. Boughner's choice of words can only be described as inappropriate, ill-chosen and demonstrating a total lack of sensitivity.

9. The union led evidence before the Board with respect to its operations and its membership requirements. This evidence establishes beyond any doubt that the union accepts into membership people employed in the taxi industry without regard to their race and that a substantial number of black persons have joined the union. At least two black persons played active roles in the union's organizing drive in Windsor. One of these persons, a dispatcher with Veteran Cab Company, was discharged by the company, but subsequently reinstated when the union successfully contended before the Board that she had been discharged because of her union activity. In the light of this evidence, we are satisfied that the union as an organization does not discriminate against black persons and that accordingly section 12 has no application to these proceedings.

10. We turn now to the claim under section 50 of the Act relating to an alleged fraud with respect to the union's membership evidence. Section 50 provides as follows:

If a trade union has obtained a certificate by fraud, the Board may at any time declare that the trade union no longer represents the employees in the bargaining unit and, upon the making of such a declaration the trade union is not entitled to claim any rights or privileges flowing from certification and, if it had made a collective agreement binding upon the employees in the bargaining unit, the collective agreement is void.

11. The complainants contend that the union obtained its certificates by fraud in that the union filed documentary evidence of membership on behalf of a driver, Mr. R. Desbien, on which Mr. Desbien's signature had been forged by Mr. William Osborne, an owner-operator. It was the contention of the union that the Board should not entertain this allegation on two grounds, namely, the delay in raising the matter, as well as the fact that Mr. Osborne is himself one of the complainants and that he should not be permitted to rely on his own wrongdoing.

12. We agree with the submission that a person should not be permitted to seek to rely on his own wrong-doing. However, Mr. Osborne is but one of the seven employees who brought this matter to the Board, and in our view the other employees are entitled to raise Mr. Osborne's alleged wrongdoings. As for the timeliness issue, section 50 of the Act indicates that an alleged fraud leading to a Board certificate can be raised at any time. Further, even in

certification proceedings the Board's practice has been not to apply a "reasonable diligence" test with respect to the timing of allegations relating to fraudulently obtained union membership evidence. See *N. J. Spivak Limited* [1976] OLRB Rep. Dec. 857. In light of these considerations the Board proceeded to hear this matter as an application to terminate the union's bargaining rights under section 50 of the Act.

13. As already indicated, the allegation raised by the complainants was that Mr. Osborne had signed Mr. Desbien's name to certain documentary evidence of membership. The evidence of membership filed by the union consists of combination applications and receipts. Each of these combination applications and receipts (hereinafter referred to simply as "union cards") has three parts. The first part is an application for membership in the union to be signed by the employee. The second part is an acknowledgment that the employee has paid the sum of one dollar to the union on account of initiation fees, which is also to be signed by the employee. The third part is a certification acknowledging receipt of the \$1.00 which is meant to be signed by the person who collects the money from the employee on behalf of the union. This type of union card when properly completed and executed meets the Board's requirements for acceptable membership evidence in the trade union in that, as per section 1(1)(j) of the Act, it shows that the employee involved has both applied for membership in the trade union and has also paid to the trade union on his behalf an amount of at least \$1.00 in respect of initiation fees or monthly dues.

14. It should be noted that the Board's usual practice in certification proceedings is to check the signatures on the cards filed by a union against sample signatures of employees supplied by the employer. In the certification proceedings involving Veteran Cab Company, however, the employer declined to file any sample signatures, and accordingly, the Board could not conduct its regular signature check.

15. Prior to the hearing in this matter Mr. Osborne told at least two people, including Mr. Desbien, that he had signed a union card on behalf of Mr. Desbien. At the hearing, however, Mr. Osborne testified that it was not he who had signed Mr. Desbien's name but either Mrs. M. Latham or Miss Sandy Weir, two drivers with Veteran Cab Company who were active in getting employees to sign union cards. We are unable to accept Mr. Osborne's evidence on this point. Having regard to Mr. Osborne's statements prior to the hearing, and having closely examined the handwriting on the union cards filed on behalf of both Mr. Osborne and Mr. Desbien, we are satisfied that both cards were executed by the same person and that Mr. Osborne did in fact sign what purported to be Mr. Desbien's signature on a union card.

16. The events leading up to the forging of Mr. Desbien's signature were as follows. On the morning of August 25, 1979 Mr. Osborne and Mrs. Laham parked their cabs in the parking lot of a plaza where Mrs. Laham sought to convince Mr. Osborne both to sign a union card and also try to get Mr. Desbien, who at times drove Mr. Osborne's cab, to also sign a card. During this discussion Mrs. Laham was advised over her cab radio that she had a fare to pick up. Before Mrs. Laham drove off, she handed two un-executed union cards to Mr. Osborne. Just prior to Mrs. Laham leaving the parking lot, Miss Weir drove up in her cab.

17. There is no reliable direct evidence as to what occurred in the plaza after Mrs. Laham left. Mr. Osborne's testimony that either Miss Weir or Mrs. Laham forged Mr. Desbien's name to a union card we have already rejected. Miss Weir was not called as a witness. We do know that the union filed a card with the Board dated August 25, 1979 bearing

the forged signature of Mr. Desbien in two places, once indicating that he was applying for membership in the union, and the second signature acknowledging that he had paid \$1.00 on account of initiation fees in the union. The card also contains the signature of Miss Weir below the following statement.

“I hereby certify that I have received the sum of \$1.00 on account of initiation fees in the above chartered local union of the Canadian Labour Congress from the person whose signature appears above.”

The evidence indicates that this card was one of a number which Miss Weir handed to Mrs. Laham for forwarding to the union. The evidence also establishes that at about 10:00 on the morning in question, Mr. Osborne met Mr. Desbien and said he had a union card for him. This was a reference to a severable receipt portion of the union card which was meant to be handed to a new member by the collector of the dollar. Mr. Desbien advised Mr. Osborne that he did not want to join the union. It is beyond dispute that Mr. Desbien never paid any money to the union, and that if Miss Weir did in fact receive any money in connection with the forged card, it must have been paid by Mr. Osborne.

18. As already indicated, Miss Weir was not called as a witness by the union to rebut the complainants' evidence or to explain her conduct. The union also made no request for an adjournment to allow it an opportunity to call Miss Weir to testify. On the basis of a letter filed with the Board subsequent to the hearing by counsel for the union, it appears that both on the day prior to the hearing and the day of the hearing itself, counsel for the union sought to have Miss Weir contacted and asked to come to the hearing, but that Miss Weir could not be reached. Although at the commencement of the hearing counsel for the union contended that the particulars of misconduct filed by the union were deficient, nevertheless by the end of the complainants' case the issue of Miss Weir's conduct had clearly been put in issue, especially since counsel had been shown the card allegedly signed by Mr. Desbien bearing Miss Weir's signature as the collector. If the union felt that its case could be helped by requiring Miss Weir's attendance, an adjournment could have been requested not merely to allow the union to ask Miss Weir to attend, but indeed to compel her to attend and testify pursuant to a Board summons to witness. The union, however, chose not to do so and we can only draw the inference that it did not do so because it felt that Miss Weir's testimony would not assist its position. In these circumstances, and having regard to the facts before us, including the relatively short time period between Mr. Osborne's meeting with Miss Weir in the parking lot, and his subsequent meeting with Mr. Desbien, when he sought to give Mr. Desbien the severable receipt portion of the union card, we are led to the conclusion that Mr. Osborne likely forged Mr. Desbien's name to a union card in the presence of Miss Weir in the parking lot, and that Miss Weir accepted the card on behalf of the union.

19. To establish a fraud under section 50, it must be demonstrated that a false representation was made to the Board which the Board relied on and also that the representation was known, or ought reasonably to have been known by the purveyor thereof to be false. See: *Derry v. Peek* (1889) 14 App. Cas. 337 and *Carleton University*, [1976] OLRB Rep. Aug. 450. Here Miss Weir accepted a card on behalf of the union knowing that the employee signature on it had been forged, and also signed the card stating that she had received a dollar from Mr. Desbien when she had in fact not done so. The Board subsequently accepted the card as evidence of membership on behalf of Mr. Desbien. In these circumstances we are satisfied that Miss Weir, acting on behalf of the union, did in fact perpetrate a fraud on the Board.

20. The fact that a fraud was committed by Miss Weir acting on behalf of the union does not, in our view, automatically mean that the Board must terminate the union's bargaining rights under section 50. The section itself gives the Board a discretion as to whether or not it will do so. However, once a fraud has been established in a proceeding under section 50, we feel it is incumbent on the union to make out a case as to why its bargaining rights should not be terminated. In particular, if the union is not to have its bargaining rights terminated it should be able to demonstrate that the fraud was an isolated matter unknown to any responsible officers or officials of the union, that union officials took reasonable steps to ensure that membership evidence would be properly obtained, and that at the end of the organizing campaign the type of inquiries called for on the Form 8 declaration concerning membership documents filed by the union were in fact made.

21. The union led no evidence at all concerning its organizing campaign. In cross-examination Mrs. Laham did indicate that she had been instructed on how to sign-up employees by Mr. McDowell, the President of the union. However, there is no evidence before us as to what instructions, if any, were given to Miss Weir or the nine other individuals who acted as collectors with respect to a majority of the cards filed by the union. The evidence indicates that Miss Weir's contact in the union was Mrs. Laham. In cross-examination Mrs. Laham indicated that when she received completed union cards from Miss Weir she did not question Miss Weir about the cards but simply forwarded them to Mr. McDowell. This leads one to wonder how many of the other collectors did not deal directly with Mr. McDowell, but rather dealt with Mrs. Laham or perhaps someone else who did not query the collector concerning the accuracy of the cards. Because union cards are but a form of written hearsay which are not generally subject to cross-examination, the Board will not give any weight to the cards unless they are accompanied by a Form 8 Declaration on which a responsible union official, on the basis of his or her personal knowledge and inquiries, declares that the persons signing the cards as collectors actually received the money indicated on the cards from the employees named on the cards. We know that one collector did not in fact receive any money from the employee named on the card but instead knowingly accepted a forged card. This in turn raises the question of whether Mr. McDowell, the Form 8 Declarant, actually made the inquiries referred to on the Form 8 and if he did, how adequate his inquiries were. No evidence was led with respect to these matters. In these circumstances, we cannot be certain that the fraud committed by Miss Weir was an isolated matter unknown to any officers or officials of the union, that the union took reasonable steps to ensure that its membership evidence was properly obtained or that at the end of the organizing campaign sufficient inquiries were made of the various collectors concerning the propriety of the membership evidence.

22. We cannot condemn the actions of Mr. Osborne too strongly. He forged another person's signature to a union card, and at the hearing perjured himself by trying to lay the responsibility on others. However, having regard to the fact that the forged card was knowingly accepted by Miss Weir on behalf of the union and that Miss Weir signed the card acknowledging receipt of a dollar from a person who paid her no money, as well as to the lack of any evidence to establish that the union took reasonable steps to ensure the propriety of its membership evidence prior to filing it with the Board, we are of the view that the Board should exercise its discretion under section 50 of the Act and declare that the union no longer represents the employees in the two bargaining units for which it was certified on the basis of cards obtained during its single organizing campaign. Accordingly, the Board hereby declares that Ontario Taxi Association 1688 Canadian Labour Congress no longer represents the drivers, and owner-operators, employed by Windsor Airline Limousine Services Limited carrying on business as Veteran Cab Company.

1038-81-R Ontario Public Service Employees Union, Applicant, v. Renaissance Homes Inc., Respondent, v. Group of Employees, Objectors.

Certification – Petition – Employer stating its opposition to union – Suggesting closing down of operations – Whether affecting voluntariness of petitions

BEFORE: N. B. Satterfield, Vice-Chairman and Board Members H. Kobryn and J. Wilson.

APPEARANCES: *C. Paliare, P. Seville and M. Morgan for the applicant; J. Craddock and D. Wyatt for the respondent; M. Lane, L. Fletcher, G. Doucet, D. Farrell and R. Jones for the objectors.*

DECISION OF THE BOARD; September 8, 1981

1. The name: "Renaissance Homes" appearing in the style of cause of this application as the name of the respondent is amended to read: "Renaissance Homes Inc."
2. This is an application for certification.
3. The Board finds that the applicant is a trade union within the meaning of section 1(1)(n) of *The Labour Relations Act*.
4. Having regard to the agreement of the parties, the Board further finds that all employees of the respondent in Oakville, Ontario, save and except the supervisor and persons above that rank, constitute a unit of employees of the respondent appropriate for collective bargaining.
5. The Board is satisfied on the basis of all the evidence before it that more than fifty-five per cent of the employees of the respondent in the bargaining unit at the time the application was made, were members of the applicant on August 21, 1981, the terminal date fixed for this application and the date which the Board determines, under section 92(2)(j) of *The Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.
6. Thus the applicant is in a position to be certified without need of a representation vote. In fact, the applicant filed a membership card on behalf of each of the employees of the respondent named on the list filed by the respondent as being employees falling within the bargaining unit described above. There were filed with the Board, however, five identical statements of desire in opposition to the application, each dated August 20th, 1981 and each signed by an employee who had previously signed an application for membership in the applicant trade union. These statements read as follows:

"In response to *The Labour Relations Act* Notice to Employees of Application for Certification and of Hearing between Ontario Public Service Employees Union and Renaissance Homes;

I, "...", as an employee of Renaissance Homes, request a stop of all proceedings towards the certification of Ontario Public Service

Employees Union as bargaining agent between the employees of Renaissance Homes and their employer John Farrell, Director of Renaissance Homes Inc.

After careful consideration I feel that I am capable of negotiating with my employer on my own behalf and therefore choose to do so."

If these statements are proven to express the voluntary wishes of the employees who signed them, it would normally cause the Board to exercise its discretion under section 7(2) of the Act to direct the taking of a representation vote because the documents raise doubts as to whether the applicant continues to enjoy the support of more than fifty-five per cent of the employees in the bargaining unit when this application was made. Accordingly, the Board conducted its usual inquiry into the origin, preparation, circulation and filing with the Board of the five statements.

7. All five of the objectors appeared at the Board's hearing into this application and three of them, Robert Jones, Dan Farrell and Lee Fletcher testified. Jones was spokesman for the group. From their testimony and the evidence of witnesses for the applicant and the respondent the Board makes the following findings of fact.

8. Since mid-July 1979, the respondent has operated a group home for disturbed children called the Halton Shelter under contract from and on behalf of the Halton Children's Aid Society. The respondent's contract with the society expired June 30, 1981. The respondent has been operating the Shelter on a day to day basis under the same financial terms as had existed under the expired contract. The respondent and the society had attempted since March 1981 to negotiate a new contract for the operation of the Shelter but, as of July 1981 when the negotiations came to a standstill, they had been unsuccessful in coming to new terms. While neither party has given formal notice to the other of its intent to terminate the day by day arrangement, it appears that the owner of the respondent may have advised the Society on or about August 10th that it would have to cease operating the Shelter if they could not come to terms for a new contract.

9. Some of the testimony of the objectors and their submissions on the evidence suggest that a representative of the applicant misled employees as to the purpose and effect of their signing membership cards into the applicant. That clearly was not the case on the evidence. If there was any misleading at all, and the Board makes no finding either way, then it was done by some of the employees, including two of the objectors, who may have made misleading statements to other employees as a result of their own misunderstanding. The union representative was not present at the meeting when these statements were made.

10. The Board is satisfied with the manner in which the five documents were prepared, signed and filed with the Board, but for the purpose of determining the issue of voluntariness, the Board is concerned with the effect on their origin of various events which took place prior to the emergence of the documents.

11. On July 21, 1981, three employees, including two who are now objectors, met at their request with a representative of the applicant to discuss how to become represented by a trade union and the ramifications of representation. Seven employees met at the home of one of them on July 30th and each completed an application for membership in the applicant. The two who were not at the meeting later signed cards too. The union representative picked up the

cards on August 4th and filed this application for certification on August 5th. The next day, eight of the employees, including the five objectors met with the Shelter supervisor to advise him that the employees were going to "unionize", that their action was not directed at him and that they wanted him to know before he received formal notice of their actions. It is not clear on the evidence that these employees knew that the application had already been made when they were speaking with the supervisor, but they fully realized that, since they had signed membership cards with the applicant, the supervisor would ultimately receive some form of advice or notice regarding their efforts to unionize. When the supervisor informed his superiors of what the employees had told him, he was asked to arrange a meeting with all of the employees of the Shelter. Accordingly, a meeting was held on the morning of August 11th attended by all of the employees, the Shelter supervisor, the owner of the respondent, Mr. John Farrell and his partner Mr. Dirk Wyatt, who is also a shareholder of the respondent. The meeting lasted for some three to three and one-half hours and a major part of the time was taken up with discussion of complaints and grievances from the employees. The respondent acknowledges that the employees at the meeting were told that it was opposed to a third party intervene in the relationships between the respondent and the employees because, in the respondent's view, such intervention would interfere with the respondent's wardship of the children assigned to the Shelter. The evidence does not reveal why the respondent thought the presence of a union would interfere with its wardship of the children but its concern seems to arise, in part at least, from its claim that one employee at the meeting expressed the expectation that the union would intervene on the employees' behalf directly with the Children's Aid Society. They were reminded that they still had time to change their minds about the union and advise it so. The respondent acknowledges, as well, that the possibility of the Shelter being closed or of the respondent withdrawing from its operation was put to the meeting in the context of the poor financial results from its operation and the difficulties that the respondent was encountering in negotiating contract terms satisfactory to it. The Board is satisfied on the evidence that no date for the potential closing was mentioned at the meeting. When an employee complained at the meeting that a 10 per cent raise granted this year had been inadequate, the respondent offered to intercede directly with the Children's Aid Society to see if it could obtain an immediate three per cent increase, negotiate a six month's contract with the Society and on renewal thereof seek a further eight per cent increase.

12. Following this meeting, the union representative was contacted by one of the employees and asked to organize a meeting of all employees. That same evening, August 11th, the representative met with six of the nine employees. After listening to the employees' comments about the meeting with the respondent earlier that day, and observing their uncertainty over the application, the representative advised the employees that they should decide individually whether they wished to be represented by the union and by 3 p.m. on August 13th notify an employee designated by the representative of their decision. They were told that the union would abide by the wishes of the majority of them, even if the decision was to withdraw the application. The result of the "vote" was 6-3 in favour of letting the application stand, although this final result came after two employees, one of them being an objector, changed their minds after originally indicating that they were in favour of withdrawing the application.

13. The respondent sent a telegram on August 17th, 1981 to all staff stating as follows:

"We regret to advise you that your employment is terminated fourteen days from this date, effective August 31".

The copy of the telegram sent to Jones indicates that it was sent at 10:24 p.m. on August 17th, although he first received the message by telephone around 9:00 a.m. on August 18th. Lee Fletcher told the Board that she received a telephone message about the telegram during the evening of August 17th and that same evening spoke to two of the other objectors about it. The respondent told the Board that the purpose of sending the telegram was to satisfy the statutory requirement of giving two weeks notice in writing to the employees in the event that the Society decided on short notice to either close the Shelter or replace the respondent as its operator. The employees had been given no indication, however, that their employment may continue beyond August 31.

14. In the interval between the majority decision of the employees to continue with the application and August 17th, one of the objectors had sought legal advice on how to prevent the application from going ahead. On August 17th the five objectors agreed to meet the following day to discuss a course of action. They did meet on the morning of August 18th and prepared a typewritten notice to the applicant, signed by all five of them, which states as follows:

“As of Tuesday August 18, 1981 the staff members of Renaissance Homes (Halton Shelter) 1470 Bronte Road, Oakville, Ontario: — would like you to stop all union activities on our behalf. We have not been pressured in any way, shape or form by the owners or the management of Renaissance Homes.”.

One of the objectors delivered the notice to the union representative shortly after it had been signed and was told by the representative that this notice would have no effect on the application.

15. As a result of this application having been made during the strike in the Post Office, it was necessary for the Board to arrange to serve the employees individually with notice of the application. The employees and the respondent received the Board's notice on August 20th, the day before the terminal date for this application. On receipt of his notice Jones decided to prepare a statement in opposition to the application and, with the assistance of another petitioner, prepared the five identical documents described above. Their two statements together with that of a third objector were signed on the evening of August 20th and the other two were signed the next day, August 21st. Jones delivered the five statements to the Board later that day.

16. Whenever the Board is assessing statements filed by employees in opposition to an application for certification, the issue for the Board is one of voluntariness. Before the Board will give any weight to such statements in the context of the Board's exercise of its discretion under section 7 of the Act, it must be satisfied that such statements are voluntary. In this respect, the Board has disregarded such statements not only when their emergence has been influenced by actual involvement of the employer, but also where the employees who signed them may have been influenced by their reasonable perception that the employer was involved.

17. The Board's primary concern in the instant case is with the effect on the employees of the statements made by the respondent at the August 11th meeting and its telegram sent barely a week later advising the employees that their employment would be terminated as of

August 31st. In the meeting the employer made its opposition to a union becoming involved at the Shelter quite clear. There is nothing unlawful in an employer being opposed, *per se*, to trade unions and expressing that opposition, as long as the employer's remarks are within the bounds of legitimate free expression and do not serve to intimidate or coerce the employees to whom they were addressed. But in the case at hand, the respondent's expressed opposition to having a union at the Shelter was coupled with its comments about possibly having to withdraw from operation of the Shelter and with its reminder to the employees that they still had time to change their minds and advise the union accordingly. Without deciding if the respondent's remarks made in the context of these circumstances exceed the bounds of free expression, the circumstances above serve to imply that the result which the respondent expected from the meeting was for the employees to change their minds. Then, within less than a week, the respondent sent the telegram notifying the employees that their employment would be terminated as of August 31st. Whether or not the telegram was sent for the purpose attributed to it by the respondent, coming so soon after the August 11th meeting, it would be difficult, if not impossible for the employees to divorce it from the respondent's statements at the meeting. Even if the respondent's statements and actions were put in the best possible light and no intent to influence the employees attached to them, taken in the context of the sequence of events starting with the employees advising the Shelter supervisor of their actions through to the signing of the five individual statements in opposition to the application for certification, the respondent's statements and actions, in the Board's view, were capable of unduly influencing the employees to repudiate their support of the applicant, thus thwarting free expression. In these circumstances, the Board concludes that the five individual statements made in opposition to this application are not a voluntary expression of the wishes of the employees who signed them. The Board, therefore, will not exercise its discretion under section 7(2) of the Act to direct that a representation vote be held.

18. A certificate will issue to the applicant.
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2425-80-U United Steelworkers of America, Complainant, v. Sling-Choker Manufacturing Limited, Respondent.

Discharge for Union Activity – Section 79 – Board finding discharge for union activity and ordering reinstatement with full compensation – Grievor reinstated but not to former job – Usual wage increased denied – Whether motivated by anti-union sentiments

BEFORE: N. B. Satterfield, Vice-Chairman and Board Members J. Wilson and M. A. Ross.

APPEARANCES: *Norm Carriere for the complainant; Tom Carron and Paul Villgren for the respondent.*

DECISION OF THE BOARD; September 17, 1981

1. The name: "Sling Choker Manufacturing Ltd." appearing in the style of cause of this application as the name of the respondent is amended to read: "Sling-Choker Manufacturing Limited."
2. This is a complaint filed under section 79 of *The Labour Relations Act* alleging that the grievor, Roger Perreault was terminated from employment by Sling-Choker Manufacturing Limited ("the employer") contrary to the provisions of section 58 of the Act. More specifically the complaint states that Perreault was terminated on or about February 5th, 1981 because of his known support for the union and in support of that allegation, the complaint referred in the following terms to an earlier complaint involving Perreault:

"The applicant draws the Board's attention to File No. 1524-80-U.

Roger Perreault returned to work on January 20, 1981. On January 25th he was put on the graveyard shift which carries a 50¢ per hour premium. Perreault was not paid the premium and when he raised that with Mr. Villgren, the plant manager, also the fact that he had not received the wage increase granted to other employees, Villgren told him that he was being transferred to Elliot Lake. Perreault indicated that he was not prepared for a transfer to Elliot Lake, at which point he was terminated by Mr. Villgren.

Relative to Board File No. 1524-80-U and Perreault's reinstatement, when Perreault was paid the monies owing to him for lost wages, \$30.00 was deducted from his cheque for the cost of overalls which he did not use for the period of time that he had been unjustly terminated."

3. At the commencement of the hearing into the complaint, counsel for the employer informed the Board that the employer had offered to reinstate Perreault and would be doing so, but it had been unable to agree with the complainant United Steelworkers of America ("the union") on the conditions attaching to that reinstatement, except for the fact that he would be reimbursed the \$30.00 which had been deducted from his pay for coveralls. The parties were agreed that the issue before the Board was what conditions were to apply to Perreault's reinstatement.

4. As this complaint indicates, Perreault was the grievor in an earlier complaint brought by the union on his behalf. In that complaint, the Board found that the employer's refusal early in October of 1980 to continue to employ Perreault was a violation of the Act. Prior to that incident, Perreault had been a truck driver-splicer at the employer's Sudbury plant. The Board's decision in that complaint issued January 9th, 1981 and directed in the following terms that he be reinstated by the employer:

"The Board therefore orders:

- (i) That Roger Perreault be reinstated by the respondent forthwith;
- (ii) that Roger Perreault be fully compensated by the respondent for all lost wages and benefits sustained through the respondent's violation of the Act;"

5. The evidence in the instant case reveals that the employer manufactures from steel cable, nylon rope and chain, various types of slings used for hoisting materials. At the times material to the complaint it had a plant in Sudbury and a branch in Elliot Lake. Perreault worked at the Sudbury plant. Prior to the first complaint, he drove the employer's truck when there was a need for this and the rest of the time he worked in the plant as a splicer or doing shop labour. All but one or two of the employees in the plant are splicers. Perreault spent a variable amount of time driving the truck, but on the average he was occupied three days a week with that type of work. At that same point in time, the employer was operating the Sudbury plant on two shifts, days and afternoons and this was the case until the latter part of 1980 when it became necessary for him to add a third shift because of the acquisition of a substantial order, the delivery dates for which could only be met by producing the order on the third shift. That shift was still in effect when Perreault was reinstated in employment with the employer on January 20th, 1981 as a result of the Board's January 9th direction. He worked as a splicer for four days on the day shift, after which he was assigned to the third shift. Approximately two weeks after his return to work, Perreault received his first pay cheque and noticed that it did not include a shift bonus which he was expecting to be paid for working on the third shift. As a result, he waited after the end of his shift on February 5th to speak with the owner to ask him why he was not receiving the bonus. He also believed that the annual wage increases had been given out a couple of days before this and asked about it as well. Perreault was told that there was no shift bonus and that he would not be receiving a wage increase. The owner then told Perreault that he wanted him to report for work at the Elliot Lake branch the following Monday morning, February 9th. When Perreault refused to go, he was told that he was fired. The employer's refusal to continue Perreault's employment in October 1980 which the Board found to be a violation of the Act also involved a refusal to accept a transfer to the Elliot Lake plant. The February 5th incident gave rise to the instant complaint being filed on February 10th, 1981. Perreault next returned to work on April 5th following receipt by him of a letter dated April 3rd from the employer's legal counsel requesting that he report for duty at the Sudbury plant for 11:30 p.m. on April 5th. He did as requested and was reinstated as a splicer on the third shift.

6. The owner told the Board that the reason why he wanted to transfer Perreault to Elliot Lake was because the branch was short-handed, which was the same reason that he gave for attempting to transfer Perreault there before the first complaint and he picked Perreault this second time because the employer had received reports that he was getting the "cold

shoulder" from some of the Sudbury employees. There is no evidence of any other employee being asked to go. Once again Perreault refused the transfer. There is no evidence to indicate why, on February 5th, barely more than two weeks after he had been reinstated at the Board's direction, the employer would expect Perreault's response to be any different.

7. These facts, including the Board's prior finding that the employer had violated section 58 of the Act, the brief lapse of time between Perreault's reinstatement and the employer's attempt to transfer him to Elliot Lake, the lack of evidence to establish that the employer's decision to transfer him was made solely for valid business reasons, viewed in the light of the onus placed on the employer by subsection 4a of section 79 of the Act, lead the Board to conclude that the employer has not proved, on the balance of probabilities, that Perreault's discharge was not motivated at least in part by the employer's anti-union considerations.

8. Accordingly the Board finds that the employer's termination of Perreault's employment on February 5th, 1981 was a violation of section 58 of the Act. Therefore it remains for the Board to fashion an appropriate remedy pursuant to its remedial powers under subsection 4 of section 79 of the Act. In this respect, the Board's finding of facts are set out below and, where there was conflict in the evidence, these findings were made having considered the general demeanor of the witnesses, the firmness with which they recalled events and their ability to express clearly their recollections.

9. Prior to Perreault's earlier dismissal in October 1980, he worked steady days as a truck driver-splicer, driving the truck when there was a need and working in the shop as a splicer or doing general shop labour the rest of the time. According to the employer's owner, driving the truck was his main job. When the owner called Perreault about returning to work pursuant to the Board's order, he told him he was to return on day shift and to report to the shop foreman to work as a splicer. Perreault queried the owner about the truck driving job and was told another employee was doing it. The owner reiterated this reason to the Board and told the Board that he considered the employer to have complied with the Board's order by reinstating Perreault as an employee. He also told the Board that there were additional reasons for not putting Perreault back on truck driving work. He claimed that, on Perreault's last day of work before his termination in October 1980, there were two slings and a coil of rope in excess of 600 feet missing from his truck when he came to make the deliveries at customers' premises. Moreover when Perreault brought the truck back to the shop that day, there was a carton containing aerosol tins of black grease which Perreault was supposed to have delivered to a customer. The carton had been torn open, was lying upside down in the truck and three or four of the tins had broken open spreading their grease over about a square yard of the truck box. During the owner's examination in chief, he indicated to the Board that he was also concerned about a report of a driving incident involving Perreault which he had received from a major customer. Perreault made deliveries to this customer on an average of three times per week. Later during cross examination, his testimony revealed that he did not become aware of this incident until some three weeks after Perreault was terminated the second time. Perreault admits the incident, but recalls it to have happened in August or September 1980. The testimony of both the owner and Perreault indicates that no evidence was heard at the Board's hearing into the complaint over his first termination about the incident which occurred on Perreault's last day of work. Their testimony agrees also on the fact that the owner never mentioned the incident to Perreault at any time, including when Perreault questioned the owner about the truck driving job at the time he was reinstated in

employment. The Board is satisfied, on the evidence, that Perreault knew about the first incident but had not heard the employer make reference to it until the first day of the hearing into this complaint, which is also the first time that he heard of the customer's report. The owner told the Board that he did not speak to Perreault about the missing slings and coil of rope or about the broken grease containers at the time of the incident because he had already told Perreault that he was going to be transferred to the Elliot Lake branch and, further, he did not mention the incident to Perreault on his reinstatement because Perreault was not going to be driving the truck. Except for the one occasion when Perreault asked the owner about the truck driving job, he did not register a complaint with the employer about not being placed on his former job, although he did complain about the shift bonus and the wage increase. Nor did he register a complaint with the union representative who acted for him on the first complaint as well as on the instant one. Perreault told the Board that he did not complain to the employer because he was fearful of losing his job again.

10. As noted above, Perreault was reinstated by the employer following his second termination to the splicer's job on the third shift, the job which he had been doing when he was terminated on February 5th. The employer refuses to put him back on the truck driving job for the same reasons which the employer's owner gave the Board for not reinstating Perreault in that job after his first termination. In addition, the employer claims and Perreault admitted at the hearing into this complaint, that he completed and filed two applications for employment with customers of the employer while he was on the truck driving job. Perreault claims that he was doing this on time which would have been his rest break, since he did not take a formal rest break when he was out on the truck.

11. The third shift to which Perreault was transferred shortly after his first reinstatement had been established during the interval between his termination and that reinstatement. While the evidence establishes that one employee, Gilles Courtemanche, received a 40¢ per hour bonus during the time when he was transferred from the day shift to the third shift and which was terminated after he returned to day shift, the Board is satisfied that this was an individual arrangement which the employer had made with that employee. The Board is satisfied also on the evidence that no bonus was paid to other employees who worked on the third shift and that the employer does not pay a bonus for shift work. There is no foundation, therefore, for the union's claim that Perreault should be paid a bonus when assigned to that shift.

12. It is uncontradicted that the employer reviews employees' rates of pay in February each year and grants increases effective February 1st. The amount of increase varies according to the employer's assessment of the employee's work. A significant number, if not all, of the employees had been interviewed prior to Perreault's termination on February 5th, although it was on or about February 9th or 10th before the employer instructed its bookkeeper as to the increases which were to be made effective February 1st. Perreault's name was not on the list of employees whose wage rates the bookkeeper was instructed to increase. He asserts and the employer acknowledges that he confronted the owner about whether he would be getting an increase. Other splicers who were working for the employer prior to October 1st, 1980 and who were still at work in February 1981 received increases as follows:

Mackey	\$1.10/hr
Rafuse	.875/hr
Brosseau	.75/hr
Courtemanche	.60/hr
Laverdiere	.55/hr

13. When the Board fashions relief for an employee who has been dealt with by his employer in a manner which violates the Act, the basic objective is to place that employee, insofar as is possible, in the position that he would have been in if the violation of the Act had not occurred by restoring him to his former job and compensating him for all lost wages and other benefits, including such increases in wages and benefits as he would have received had he not been dealt with contrary to the Act; in other words, to make the employee "whole" again. The violation with which the Board is dealing herein was the second of two successive ones and came scarcely more than two weeks after Perreault was reinstated in employment as a result of the Board finding the first violation. In spite of the fact that the employer's owner referred in his testimony to the truck driver part of Perreault's job of truck driver-splicer as his main job, that is not the job to which Perreault was reinstated on January 20th. In addition, there is convincing evidence that the owner had interviewed most, if not all, of the employees about their February 1st wage increases between January 20th and the date on which Perreault was terminated the second time. Yet when Perreault questioned the owner as to whether he would be receiving an increase this year, the encounter ended with him being told to report to the Elliot Lake branch and being fired when he refused to do so.

14. The employer in this case is not bound by any collective bargaining relationship so there can be no doubt that, subject to the provisions of *The Labour Relations Act*, it has an unencumbered right to adopt policies and procedures which it deems appropriate for its business. The Board has no statutory authority to look behind those policies and procedures in order to assess their intrinsic fairness or the fairness of their application, assuming that the policies and procedures do not of themselves contravene the Act. See the Board's decision in *Fielding Lumber Company Limited*, [1975] OLRB Rep. Sept. 665. As that case indicates, however, that does not preclude the Board from considering the whole context of an employer's actions for the purpose of assessing its motivation for taking those actions. While the Board's observations in *Fielding Lumber*, *supra*, were made with respect to the Board determining whether an employer's actions contravene the Act, the observations have equal validity for consideration when fashioning a remedy where a violation is found.

15. In examining the employer's conduct in the case at hand, the Board is satisfied that its treatment of Perreault, beginning with his reinstatement on January 20th, displays a pattern consistent with and linked to the original refusal to continue his employment which the Board found to be a violation of the Act. The only explanation which the employer gave to Perreault when he asked about the truck driving job was that the job was already filled. It was only when this complaint came to hearing that the employer advanced the additional reason of the incident which occurred on Perreault's last day of work before his first termination. The owner's testimony also conveyed the impression that the employer was influenced as well by a report from a customer about a driving incident on the customer's property, an event about which the employer learned only after the second termination and which occurred prior to the first one. In addition, the employer attempted to buttress its reasons by reference to Perreault having filed applications for employment with customers while driving the employer's truck. In respect to wage increases, the employer emphasized that it was its policy to interview employees individually each year about their wage increases and the owner's testimony conveyed his view that this was done fairly with emphasis on performance, but taking into account other factors such as length of service with the employer and the employee's family status. Employees are told what increase, if any, they are going to be receiving. Some half dozen employees testified that they had been interviewed this year and given increases. The evidence is that Perreault performed satisfactorily as a splicer. Yet when

Perreault questioned the owner about whether he would receive an increase this year, he got neither a reply nor an interview, but was told to report to the Elliot Lake plant. This response not only is inconsistent with the owner's claim about how he deals with his employees on the matter of wage increases, it is consistent with the employer having been motivated in its response by considerations other than Perreault's work performance.

16. In these circumstances and having regard for the "make whole" objective of Board remedies applicable to employees who have been dealt with by an employer contrary to the Act, the Board deems it essential in this case for the appropriate remedy to include restoring Perreault to the job of truck driver-splicer on day shift and assuring that he receives an appropriate wage increase. Since Perreault has performed satisfactorily as a splicer, has approximately the same service as Gilles Courtemanche who was at the same wage rate as Perreault prior to February 1st, 1981 and who worked as a splicer when needed, although he was also the employer's shipper, the Board deems an appropriate increase for Perreault to be not less than the increase given to Courtemanche, that is 60¢ per hour effective February 1, 1981.

17. In finding the restoration of Perreault to the job of truck driver-splicer on day shift and the granting of a wage increase to be essential elements of a "make whole" remedy, the Board is fully aware that the employer ordinarily has the sole right to determine work assignments, set wage rates and in fact determine all working conditions for its employees, assuming that they conform to any relevant legislation. The employer is free to apply its policies and procedures in whatever manner it finds appropriate for its business, as long as their application is not motivated by any anti-union sentiment of the employer or by a desire to penalize an employee for having exercised or having attempted to exercise a right under the Act. The Board's conclusion that Perreault must be returned to the job of truck driver-splicer on day shift does not give him any absolute right either to that job or to day shift work. The employer obviously has the right to assign work to meet its needs. This was demonstrated by the fact that the employer has had two different employees on the truck driving job during the time between Perreault's first termination and his reinstatement. In the same way, the employer has the right, subject to any applicable statutory or contractual limitation, to assign an employee to shift work, determine his rate of pay and decide whether to discipline him for poor performance or misconduct on the job. But such actions must be free of any anti-union motivation of the employer or any objective of penalizing an employee for his exercise or attempted exercise of a right under the Act. When the Board is not satisfied that the employer's actions are free of such motivation, it will fashion an appropriate remedy which will usually include a direction that the employer reverse its actions in order to make the employee whole.

18. Having regard to the Board's finding that the employer has violated section 58 of the Act when it terminated Perreault's employment on or about February 5th, 1981 and having regard to all of the evidence before it and to the submissions of the parties, the Board makes the following direction:

19. The Board orders that:

- (a) Roger Perreault be reinstated forthwith by Sling-Choker Manufacturing Limited in the job of truck driver-splicer on the day shift;

- (b) Sling-Choker Manufacturing Limited increase Roger Perreault's wage rate effective February 1, 1981 by not less than 60¢ per hour;
 - (c) Roger Perreault be fully compensated by Sling-Choker Manufacturing Limited for all lost wages and benefits sustained through the employer's violation of *The Labour Relations Act*;
 - (d) Sling-Choker Manufacturing Limited pay interest on the compensation for lost wages ordered by the Board, such interest to be calculated in the manner described in *Hallowel House Limited*, [1980] OLRB Rep. Jan. 35 (see Practice Note No. 13 dated September 8, 1980); and
 - (e) Sling-Choker Manufacturing Limited post copies of the attached notice marked "Appendix", after being duly signed by the employer's representative, in conspicuous places on its premises in Sudbury where it is likely to come to the attention of the employees, and keep the notices posted for sixty consecutive working days. Reasonable steps shall be taken by the employer to insure that the said notices are not altered, defaced or covered by any other material. Reasonable physical access to the premises shall be given by the employer to a representative of the complainant so that the complainant can satisfy itself that this posting requirement is being complied with.
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The Labour Relations Act

1297

NOTICE TO EMPLOYEES

Posted by Order of the Ontario Labour Relations Board

WE HAVE POSTED THIS NOTICE IN COMPLIANCE WITH AN ORDER OF THE ONTARIO LABOUR RELATIONS BOARD ISSUED AFTER A HEARING IN WHICH WE AND THE UNION PARTICIPATED. THE ONTARIO LABOUR RELATIONS BOARD FOUND THAT WE VIOLATED THE LABOUR RELATIONS ACT BY TERMINATING THE EMPLOYMENT OF ROGER PERREAULT ON OR ABOUT FEBRUARY 5TH, 1981.

THIS ACT GIVES ALL EMPLOYEES THESE RIGHTS:

- TO ORGANIZE THEMSELVES,
- TO FORM, JOIN AND PARTICIPATE IN THE LAWFUL ACTIVITIES OF A TRADE UNION,
- TO ACT TOGETHER FOR COLLECTIVE BARGAINING,
- TO REFUSE TO DO ANY AND ALL OF THESE THINGS.

WE ASSURE ALL OF OUR EMPLOYEES THAT:

WE WILL NOT DO ANYTHING THAT INTERFERES WITH THESE RIGHTS.

WE WILL NOT REFUSE TO CONTINUE TO EMPLOY ANY EMPLOYEE BECAUSE HE HAS SELECTED THE UNITED STEELWORKERS OF AMERICA, OR ANY OTHER TRADE UNION, AS HIS EXCLUSIVE BARGAINING REPRESENTATIVE.

WE WILL OFFER TO REINSTATE ROGER PERREAULT IN THE JOB OF TRUCK DRIVER-SPLICER ON THE DAY SHIFT.

WE WILL INCREASE ROGER PERREAULT'S WAGE RATE BY NOT LESS THAN 60¢ PER HOUR EFFECTIVE FEBRUARY 1, 1981.

WE WILL PAY ROGER PERREAULT FOR ANY EARNINGS THAT HE LOST AS A RESULT OF HIS DISCHARGE, PLUS INTEREST.

SLING-CHOKER MANUFACTURING LIMITED

PER: (AUTHORIZED REPRESENTATIVE)

This is an official notice of the Board and must not be removed or defaced.

This notice must remain posted for 60 consecutive working days.

DA D this 17TH day of SEPTEMBER, 1981.

0909-81-R Laundry, Dry Cleaning and Dye House Workers' International Union Local 351, Applicant, v. **Trans Nations Incorporated** or Trusthouse Forte Inc. D.B.A. King Edward, Respondent, v. Hotel, Restaurant and Cafeteria Employees' Union, Local 75, Intervener.

Successor Status – Trade Union Status – Intervener product of purported merger of two locals – Whether valid merger within meaning of section 54 – Whether both locals had jurisdiction to merge – Whether notice must be given to all members – *Astgen v. Smith* discussed

BEFORE: Kevin M. Burkett, Alternate Chairman and Board Members J.D. Bell and O. Hodges.

APPEARANCES: *Mr. S.B.D. Wahl, V. Knapp and F. Da Silva for the applicant; Stewart D. Saxe, Adrian Hill, Peter Rickard and Anne Walpert for the respondent; Alick Ryder, Q.C.; John Subolewski and George Pineo for the intervener.*

DECISION OF THE BOARD; September 30, 1981

1. This is an application for certification filed by Laundry, Dry Cleaning and Dye House Workers' International Union Local 351.
2. Hotel, Restaurant and Cafeteria Employees' Union, Local 75 Toronto of the Hotel and Restaurant Employees and Bartenders International Union (A.F.L. – C.I.O. – C.L.C.) (hereinafter referred to as Local 75) have filed an intervention in this matter. The applicant trade union objects to the status of Local 75 as an intervener party to these proceedings.
3. By way of general background, Local 75 came into existence in September, 1979 as the result of a purported merger between Local 254 and 299 of the Hotel and Restaurant Employees and Bartenders International Union. Local 299, one of the predecessor locals, had bargaining rights for the employees of the King Edward Hotel and had entered into a collective agreement with the King Edward Hotel in 1978. However, shortly thereafter the Hotel went into receivership and was operated by Mr. Manny Roebuck, as trustee. In September, 1979 the Hotel was sold to Trans Nations Incorporated (one of the named respondents in this matter). The Hotel was closed and extensive renovations were undertaken. The Hotel reopened as the King Edward in the Spring of 1981 under the management of Trust House Forte Inc. Trust House Forte Inc. is a company engaged in the management of hotel properties. Trans Nations, as the owner of the Hotel, and Trust House Forte are parties to an agreement under which Trust House Forte has contracted to manage and operate the Hotel, subject to the provisions of the agreement relating to termination, for a period of thirty years. The intervener claims bargaining rights in respect of the employees now employed at the King Edward and maintains that a subsisting collective agreement is a bar to the present application.
4. The applicant claims that Local 75 does not possess bargaining rights for any of the employees of the King Edward Hotel as would support its intervention in this matter. The applicant maintains firstly that the purported merger of Locals 254 and 299 is not a merger within the meaning of section 54 of *The Labour Relations Act* as would confer on Local 75 all of the rights, privileges and duties of the predecessor locals. The applicant takes the position

that Local 299 has gone out of existence, and, although Local 75 is a trade union within the meaning of section 1(1)(n) of the Act, it does not possess any of the rights, privileges or duties of Local 299. The applicant maintains secondly that even if Local 75 acquired the rights, duties and obligations of Local 299 the bargaining rights which Local 299 had in respect of employees of the King Edward Hotel have been extinguished. The applicant takes the position that the transfer of the business to Trans Nations did not constitute the sale of a business within the meaning of section 55 of the Act as would have sustained the bargaining rights. The applicant maintains thirdly, that the employer for purposes of this application is now Trust House Forte and that the transfer from Trans Nations to Trust House Forte does not constitute a sale of a business within the meaning of section 55 of the Act as would sustain bargaining rights. This last submission raises an issue as to the identity of the employer for purposes of this application.

5. This decision deals with the first submission of the applicant in support of its contention that the intervener lacks status as a party to these proceedings; that is the alleged defect in the purported merger of Locals 254 and 299 into Local 75. The issue to be addressed by the Board is whether a merger within the meaning of section 54 of the Act has taken place as would transfer to Local 75 all the rights, privileges and duties under the Act of Local 299. Specifically the Board must determine if the bargaining rights enjoyed by Local 299 in respect of the employees of the King Edward Hotel were transferred to Local 75.

6. Section 54 of the Act provides:

54.(1) Where a trade union claims that by reason of a merger or amalgamation or a transfer of jurisdiction it is the successor of a trade union that at the time of the merger, amalgamation or transfer of jurisdiction was the bargaining agent of a unit of employees of an employer and any question arises in respect of its rights to act as the successor, the Board, in any proceeding before it or on the application of any person or trade union concerned, may declare that the successor has or has not, as the case may be, acquired the rights, privileges and duties under this Act of its predecessor, or the Board may dismiss the application.

(2) Before issuing a declaration under subsection 1, the Board may make such inquiry, require the production of such evidence or hold such representation votes as it considers appropriate.

(3) Where the Board makes an affirmative declaration under subsection 1, the successor shall for the purposes of this Act be conclusively presumed to have acquired the rights, privileges and duties of its predecessor, whether under a collective agreement or otherwise, and the employer, the successor and the employees concerned shall recognise such status in all respects.

7. The intervener relies on two previous Board decisions in support of its position that it has assumed the rights, privileges and duties of local 299; including the bargaining rights in respect of employees at the King Edward Hotel. The intervener maintains that the issue now raised with respect to the merger was decided in both *Royal Canadian Yacht Club*,

unreported, Board File No. 0780-80-R, August 5, 1980 and *Toronto Airport Hilton Inc.* [1980] OLRB Rep. Sept. 1330. In both these cases Local 75 successfully brought before the Board applications for certification. In *Royal Canadian Yacht Club* the Board found Local 75 to be a trade union within the meaning of section 1(1)(n) of the Act. The Board made its finding "having regard to the evidence presented" and did not elaborate. In *Toronto Airport Hilton*, which was entertained by the Board shortly after its disposition of the *Royal Canadian Yacht Club* case, the trade union status of Local 75 was challenged by the respondent company on the ground that some of the persons who joined Local 299 prior to June 1, 1980 were not notified of the proposed "merger".

The Board found in that case that:

. . . having regard to all the submissions (which counsel agreed would be treated by the Board as proof of the facts alleged therein) and the evidence before it, including the Constitution of the Hotel and Restaurant Employees' and Bartenders' International Union, and the Declaration and Order for Merger of Locals 299 and 254 the Board finds that the applicant is a trade union within the meaning of section 1(1)(n) of the Act.

A number of the membership cards submitted by Local 75 in support of its application for certification in *Airport Hilton* carried the name of Local 299. The Board noted that Local 75 was created on June 1, 1980, by a "merger" of Local 299 and Local 254, cited a number of paragraphs in the "Declaration and Order for Merger", including the proviso that "all members of locals 299 and 254 automatically shall become members of Local 75 upon the effective date of the merger and their membership status shall remain unbroken as a result of the merger", and found that the cards in dispute constituted valid evidence of membership in the applicant. The Board noted that when the cards were signed Local 299 "had ceased to exist by virtue of the June 1, 1980 "merger" and that the applicant (Local 75) was the only Local operating in the area with a name bearing any resemblance to the name on the cards." The Board also noted that the fact that no employees intervened in the application after the posting of the notice of application in the name of Local 75 "suggests that the employees intended to become members of the applicant by signing cards which, as a result of an administrative error, bore the name of one of the applicant's predecessors."

8. The evidence before the Board relating to the merger includes the respective constitutions of the two predecessor locals and that of the International. It is expressly provided that both locals are "affiliated" with the International. Article II Section 1 of Local 299's Constitution provides that:

Membership of this organization shall consist of an unlimited number of workers in the hotel, motel and restaurant industries, who agree to abide by the Bylaws of this Local, the Ritual and the Constitution of the Hotel and Restaurant Employees and Bartenders International Union, as now in effect or as they may hereafter be amended.

Section 2 of Article II goes on to stipulate that "a person eligible for membership . . . making application for membership shall become a member of this local and the International union

upon receipt of the membership application". Article XIV, Section 1 incorporates by reference the terms of the International Constitution. It provides:

The terms and provisions of the Constitution of the Hotel and Restaurant Employees and Bartenders International Union and any amendments thereto shall be binding upon this Local Union, its officers and members as if fully set forth herein. Any provisions of these bylaws which are in conflict with the International Constitution or Provincial or Federal law shall be of no force or effect.

There is no provision in the Constitution of Local 299 expressly describing the procedure to be followed for merger with another union.

9. Article 3, Section 1 of the Local 254 Constitution is, for our purposes, identical to Article II, Section 1 of the Local 299 Constitution. It provides:

MEMBERSHIP in this organization shall consist of an unlimited number of workers in the *RESTAURANT, CAFETERIA AND TAVERN INDUSTRY*, who agree to abide by the by-laws of this Local Union and the Ritual and Constitution of the Hotel & Restaurant Employees and Bartenders' Int'l Union, as now in effect or that may hereafter be amended.

Similarly, Article 4, Section 1 of the Local 254 Constitution is identical to Article II Section 2 of the Local 299 Constitution in that it is stipulated that a person must become a member of both the Local and the International. There is no provision in the Local 254 Constitution which corresponds with that of Article XIV Section 1 of the Local 299 Constitution. However, Article 2, Section 2, *Jurisdiction* of the Local 254 Constitution provides that "this local shall have jurisdiction as is now in effect . . . or may be allocated to it by the General President of the International Union." As with the Local 299 Constitution, there is no express provision dealing with merger in the Local 254 Constitution.

10. Article X of the Constitution of the Hotel and Restaurant Employees and Bartenders International Union deals with "Local Unions". It stipulates in part:

Section 2. BY-LAWS

(a) Local Unions shall be required to enact their own by-laws; provided, however, that such by-laws may not conflict with the International Constitution, federal, state or provincial laws, and are approved by the General President as provided in (b) of this Section.

(b) All Local Unions shall submit by-laws and amendments thereto to the General President for approval, and these shall become effective on the date final approval is given thereof by the General President. Such approval shall not foreclose him from ordering changes or elimination of provisions if at any time thereafter it is found that such provisions are in conflict with the International Constitution or applicable laws.

Section 9. ALLOCATION OF JURISDICTION.

The General President may in specific instances allocate jurisdiction to Local Unions where new Locals are formed and has final authority to determine jurisdiction in all cases where disputes arise.

Section 10. ELECTION OF UNION OFFICERS.

(a) Election of officers of a Local Union shall be held not less than once every three years by secret ballot among the members in good standing of the Local Union, *except for all Canadian affiliates, whose election to office shall be at least every five years and shall be in accordance with all appropriate Federal and Provincial Canadian requirements.* The Local union shall mail to each member in good standing at his last known home address a notice of the offices to be filled, time, date and place and the manner of submitting nominations and the time, date and place of the election, which election shall be held not sooner than 15 days from the giving of notice.

(b) The Local Unions shall provide safeguards to insure a fair selection and the Secretary of each Local Union shall preserve for one (1) year the ballots and other records pertaining to the election. The votes cast by the members shall be counted and the results published in detail.

(c) Bylaws of the Local Union shall set forth the dates for nomination and election of Local Union officers. The General President may change the dates for nominations and election provided that such change shall not affect the term of office for which any officer has been elected and provided that the provisions of sections (a) and (b) of this Section 10 are followed.

Article V, section 16 of the constitution of the International deals specifically with "mergers of Local Unions and other Subordinate Bodies". The section provides:

Section 16. MERGERS OF LOCAL UNIONS AND OTHER SUBORDINATE BODIES

The General President, with the approval of the General Executive Board, shall have the power to merge local unions and other subordinate bodies under such terms and conditions and subject to such qualifications as the General President may determine, taking into consideration such circumstances as financial conditions, jurisdiction, location and such other factors as appear appropriate in connection with the local unions and other subordinate bodies involved.

11. The matter of a possible merger was first discussed within Local 254 at a membership meeting which took place on October 16, 1979. The minutes of that meeting show, under the heading of "New Business" that,

"The matter of a possible amalgamation of Locals 254 and 299 was raised and a general discussion followed, as to the steps that should be taken to make the amalgamation possible.

Moved, seconded and *unanimously carried*, that the officers of Local 254 investigate the possibility of a merger between Local 254 and Local 299."

It was decided, at a membership meeting held on January 15, 1980 "to take a vote in all locations covered by the contracts and report back when the vote is completed". The notice of the vote was posted in all Toronto locations at which members of the Local were employed. Verbal notice was given to those members of the Local working in camps. The Local admits that it did not mail individual notices to everyone on the rolls. A report tabled at a membership meeting held on April 13, 1980 reveals that of the 243 ballots cast "on merger vote taken in all camps and city locations" 233 were in favour of merger, 9 were against the proposed merger and 1 ballot was spoiled. It is admitted that some members did not vote. The report was accepted and carried unanimously. The Secretary-Treasurer of Local 254 wrote to the General President of the International on April 18, 1980 advising him of the decision taken by the Local with respect to a merger of Locals 254 and 299 and asking for a formal declaration and order for merger.

12. The minutes of a membership meeting of Local 299 held on November 7, 1979 reveal that the "president reported on the proposed merger of Locals 254, 280 with 299 to be the designated Local." At a subsequent membership meeting on December 5, 1979 the Executive Board and the officers of Local 299 recommended that the Local proceed with the merger. It was decided that "a full discussion and vote will take place at the March General membership meeting." The minutes of the General membership meeting held on Tuesday, March 11, 1980 show that:

"A full discussion was held on the merger of Local 299 and Locals 280, 254 and any other locals in the Province of Ontario that may be desirous of merging with Local 299.

The Membership of Local 299 voted unanimously in favour of the proposed merger with Locals 254, 280 and any other local desirous of merging with Local 299.

By letter dated April 21, 1980 the Secretary-Treasurer of Local 299 wrote to the General President in the International enclosing copies of the minutes of Executive Board and General membership meetings which record the procedure followed by the local in respect of the proposed merger. The letter states that "these minutes will assist you in your determination with regard to the proposed merger."

13. The General President of the International drafted a "Declaration and Order For Merger" in respect of a merger of Local 299 and Local 254 into a new Local 75 which was circulated to the members of the General Executive Board on or about May 1, 1980. The document provides in part that "all members of Locals 299 and 254 automatically shall become members of Local 75 upon the effective date of the merger and their membership status shall remain unbroken as a result of this merger." The Executive Board, after considering the draft document and the recommendation of the General President, approved

the merger. The affected locals were so advised by the General President by letter dated May 12, 1980 and the merger became effective June 1, 1980.

14. The intervenor argues firstly, that its status as a successor trade union under section 54 of the Act has been decided in both *Royal Canadian Yacht Club, supra* and *Toronto Airport Hilton, supra*. The intervenor maintains that the challenge made to its status in that case was the same as in this case. The Board in that case had before it the declaration of merger and found, not only that Local 75 was a trade union, but also that evidence of membership bearing the name of a predecessor local was valid membership evidence in support of the Local 75 application. The intervenor asks how such a finding could have been made if Local 75 was not the successor union to Local 299 within the meaning of Section 54 of the Act. It is the position of the intervenor that the Board's finding in *Toronto Airport Hilton* establishes its legal status as successor and cannot now be attacked at a time when Local 75 has over 8,000 members who have relied on the legitimacy of the merger. The intervenor asserts that it can rely on the two prior decisions of the Board.

15. Alternatively, the intervenor argues that this panel of the Board has before it the evidence necessary to make a finding that it is the successor to Local 299 and to make a declaration under Section 54 of the Act in respect thereto. The intervenor maintains that while the Constitutions of both of the merging locals are silent in respect of merger, the members of both locals under the terms of their respective Constitutions, are bound to abide by the Constitution of the International. Although admitting that the respective locals and the International are separate entities, the intervenor asserts that the Constitution of the International applies to the members of both locals and under its terms specific provision is made for the merger of local unions. It is the intervenor's position that the members of both locals have agreed to be bound by the provisions of the International Constitution respecting the manner in which a merger of locals may be carried out. The intervenor asserts further that in order to satisfy the requirements of section 54 of the Act the merger need only comply with Article V Section 16 of the International Constitution. The intervenor asks the Board to find that where the General President, with the approval of the General Executive Board, makes a decision to merge two locals, as he has done in this case, the merger has been carried out in accord with the Constitution of the International and is a valid merger for purposes of section 54 of the Act.

16. The applicant, while acknowledging the status of Local 75 as a trade union within the meaning of section 1(1)(n) of the Act, disputes that the Board has determined that Local 75 is the successor to Local 299 within the meaning of Section 54 of the Act. The applicant asserts that in neither of the prior decisions relied upon by the intervenor was the Board required to make a section 54 finding and indeed, in neither of these decisions was a section 54 declaration made. Where, as in *Toronto Airport Hilton* there are no pre-existing bargaining rights, counsel agree on the facts, there is no analysis of the constitutions of the respective locals, no reference to the jurisprudence of either the Board or the courts in respect of mergers, and where the finding as to trade union status is made under section 1(1)(n) of the Act, the applicant maintains that there has been no section 54 declaration as would transfer the bargaining rights of the predecessor local to the successor.

17. The applicant maintains that both of the predecessor locals and the International Union were separate and distinct entities at the time of the purported merger. The applicant cites *Goldstein Foodmarket*, [1971] OLRB Rep. Aug. 549 and *Steinberg's Limited*, [1972]

OLRB Rep. Jan 18 in support of the proposition that the successor local is obliged to show the proper creation and flow through of bargaining rights. The applicant asserts that if either of the two merging locals lacks the jurisdiction to merge, or fails to comply with the legal requirements to effect a merger, the merger is not one which would allow the Board to make a section 54 declaration. Citing the decision of the Ontario Court of Appeal in *Astgen v. Smith* [1970] 1 O.R. 129, 7 D.L.R. (3d) 657, and the decision of this Board in *Navco Food Services* [1971] OLRB Rep. Feb. 80, *Zehrs Markets* [1977] OLRB Rep. Oct. 637 and *Children's Aid of Metropolitan Toronto* [1980] OLRB Rep. Jan 24, the applicant argues that in the absence of a specific constitutional provision dealing with merger procedures, the merger, to have legal effect, must be approved by all of the members of the local. Whereas the Constitution of Local 299 incorporates by reference the provisions of the International Constitution and thereby the merger provisions of that Constitution, it is the position of the applicant that the Constitution of Local 254 does not expressly incorporate the merger provisions contained in the Constitution of the International. In the absence of a constitutional provision pertaining to merger, the applicant argues that Local 254 was obliged to obtain the unanimous approval of all of its members. Having failed in this regard (some members were not canvassed and of those canvassed 9 were opposed) the applicant argues that the merger has no legal effect. In these circumstances it is the position of the applicant that Local 299 having surrendered its constitution, is no longer a trade union and that Local 75, although a trade union, is not the successor to Local 299.

18. The applicant argues in the alternative that even if the provisions of the International Constitution govern and even if they were complied with in respect of the purported merger of Locals 299 and 254, both Locals were nevertheless required to provide all members with notice of the proposed merger and an opportunity to debate the matter. In support of its contention the applicant referred to *Faulds v. Hesford* (1957), 10 D.L.R. (2d) 292, *Beef Terminal*, [1970] OLRB Rep. Apr. 75, *Zehrs Markets, supra*, and *Standard Tube*, [1976] OLRB Rep. July 375. The applicant argues that on the evidence, all of the members of both Locals were not provided with notice and an opportunity to debate the proposed merger and in these circumstances the merger cannot be found to have been a merger within the meaning of section 54 of the Act. In the absence of notice it is the applicant's position that nothing can be taken from the failure of those affected to have objected.

19. In reply, the intervener argues that the principles enunciated in *Atsgen v. Smith, supra*, do not apply in that constitutional provisions stipulating the steps to be taken to effect a merger of two local unions exist in this case. Where the Constitution does not require notice to every member, it is the position of the intervener that such notice is not required. The intervener asks the Board to find that it is the successor to Local 299 and to issue a declaration under section 54 of the Act confirming its successor status.

20. We have read the decisions of the Board in *Royal Canadian Yacht Club, supra* and *Toronto Airport Hilton, supra*, and considered the submissions of the parties with respect to whether or not the Board has already made a finding that Local 75 is the successor to Local 299 under section 54 of the Act. In neither of these cases was it necessary for the Board to make a finding of successor status. The Board does not appear to have put its mind to the criteria which are usually considered in section 54 cases in either of these cases. Furthermore, neither case contains an express declaration made under section 54 of the Act. In these circumstances we accept the submissions of the applicant and find that prior to the date hereof there has been no finding under section 54 of successor status made by this Board.

21. The leading authority dealing with the merger or amalgamation of autonomous local unions is *Astgen et al v. Smith et al, supra*. In that case two unions entered into a merger agreement under which the separate identity of one of the unions was terminated and its assets and the membership of its locals transferred to the other. There was no provision in the constitution of the union which lost its existence pertaining to merger or amalgamation. However, a referendum had been taken and the members of that union voted by a two to one majority in favour of the merger. It was on the strength of this vote that the merger was consummated. An action was brought to have the merger declared a nullity. It was held in the Ontario High Court that in order to effect the merger the provisions of the Constitution had to be complied with or, where the Constitution does not address itself to the procedure for merger, a vote by the union's members which is "unanimous or nearly unanimous" approving the merger, is required. The Ontario Court of Appeal, in upholding the judgment of the lower court, ruled that in the absence of a constitutional provision stipulating the procedure to be followed in effecting a merger, which affects each and every member of the union, the unanimous concurrence of every member of the union is required.

22. The Board has been governed by the judgment of the courts in *Astgen v. Smith, supra*, in applying the provisions of section 54 of the Act. The Board's approach to the application of the section is aptly summarized in *Zehrs Markets, Division of Zehrmart Limited*, [1977] OLRB Rep. Oct. 637 as follows:

We recognize at one time the Board refused to recognize any merger, amalgamation or transfer of jurisdiction unless it had been approved by a majority of employees in the affected bargaining unit. (See, for example, the *Hydro-Electric Commission of the City of Hamilton* 63 C.L.L.C. Para 16,261). However, since the decision of the Ontario Court of *Astgen v. Smith* (1969) 7 D.L.R. (3rd) 657, the Board has instead required only assurance that either the constitutional provisions of the predecessor trade union regarding a merger, amalgamation or transfer of jurisdiction have been followed (*Navco Food Services Limited* [1947] OLRB Rep. Feb. 80) or, if there are no such constitutional provisions, that there has been unanimous approval of the change by the union membership (*Redi Steel Products Ltd.* [1970] OLRB Rep. Nov. 857).

(See also *Per-fec-tion Insulations Limited* [1980] OLRB Rep. Jan. 84, *Children's Aid Society of Metropolitan Toronto* [1980] OLRB Rep. Jan. 24, *Canadian Rexall Corporation* [1976] OLRB Rep. Sept. 557.) In *Beef Terminal Limited* [1970] OLRB Rep. Apr. 75, the decision is written in such a way as to suggest that, notwithstanding the express provisions of a union constitution, there is the additional requirement of notifying and canvassing all of the members affected by a proposed merger. Similarly, the decision of the British Columbia Supreme Court in *Faulds v. Hesford* (1957) 10 D.L.R. (2d) 292 suggests that there is an absolute requirement for specific notice. However, given the decision of the Ontario Court of Appeal in *Astgen v. Smith, supra*, and the preponderance of Board authority, we are of the view that a correct statement of the law is contained in *Zehrs Markets, supra* (as reproduced above). If there is a constitutional provision dealing with merger it must be followed. If the provision does not require specific notice to each and every member then none is required. This is not to say that there may not be some implicit requirement for general notice where the action contemplated is as fundamental as a merger. If there is a requirement for general notice we are satisfied on the evidence before us that this requirement has been met in this case.

23. The applicant citing the lack of constitutional authority, argues strenuously that Local 254 was unable to enter into a merger with Local 299 without the unanimous consent of its members. We disagree. On the face of its Constitution, Local 254 was affiliated with the International. Indeed, it was subordinate to the International in the sense that its by-laws were subject to the approval of the International and its jurisdiction is that as "may be allocated to it by the General President of the International Union." A person who becomes a member of Local 254 is required to also become a member of the International and, more importantly, under the terms of Article 3, Section 1 of the Local 254 Constitution its members "agree to abide by . . . the Ritual and Constitution of the Hotel and Restaurant Employees and Bartenders' International Union, as now in effect or that may hereafter be amended." Section 16 of the International Constitution sets out the preconditions which must be satisfied to effect a lawful merger of local unions. Given the nature of the relationship between the two organizations, the requirement for all members of the Local to be members of the International, and the agreement of the members of the Local to abide by the Constitution of the International, we can come to no other conclusion but that the members of Local 254 had agreed, one to the other, to be governed by the provisions of Section 16 of the International Constitution in respect of mergers.

24. Section 16 of the International Constitution stipulates that "the General President with the approval of the General Executive Board, shall have the power to merge unions and other subordinate bodies under such terms and conditions and subject to such qualifications as the General President may determine . . ." It is clear on the evidence that the conditions precedent to a proper merger of the two locals, as set out in the International Constitution, as agreed to by the members of each local, have been satisfied. Accordingly, pursuant to Section 54 of the Act, we hereby declare that Local 75 of the Hotel, Restaurant and Cafeteria Employees' Union, is the successor union to Locals 254 and 299 of the Hotel and Restaurant and Bartenders International Union.

0645-81-R Hotel, Restaurant and Cafeteria Employees Union, Local 75, Applicant, v. Waldorf Astoria Hotel, Respondent.

Charges – Membership Evidence – Management employee soliciting membership support for union – Suggesting loss of jobs if cards not signed – Whether perceived as acting on behalf of employer – Whether certification barred by section 12 – Whether casting doubt on membership evidence – Board directing representation vote

BEFORE: R. D. Howe, Vice-Chairman, and Board Members M. J. Fenwick and W. H. Wightman.

APPEARANCES: *Ian Roland and George Pineo for the applicant; R. C. Fillion, Peter J. Thorup and Ward Hagar for the respondent.*

DECISION OF THE BOARD; September 17, 1981

1. The name: "Waldorf Astoria Apartment Hotel" appearing in the style of cause of this application as the name of the respondent is amended to read: "Waldorf Astoria Hotel".
2. This is an application for certification.
3. The Board finds that the applicant is a trade union within the meaning of section 1(1)(n) of *The Labour Relations Act*.
4. The parties are in partial agreement with respect to the description of the bargaining units. However, the parties are in dispute as to whether S. Harris, the head housekeeper, should be included in the bargaining units, as contended by the applicant, or excluded from the bargaining units, as submitted by the respondent. It is the respondent's position that the head housekeeper should be excluded on the ground that he exercises managerial functions within the meaning of section 1(3)(b) of the Act.
5. The criteria which are generally considered by the Board to be relevant to the determination of whether or not an individual exercises managerial functions are well established in the Board's jurisprudence; see, for example, *Hydro Electric Commission of the Borough of Etobicoke*, [1981] OLRB Rep. Jan 38 and the cases cited therein. Having regard to all of the evidence and the submissions of the parties, the Board is of the opinion that as of the date of this application, Mr. Harris exercised managerial functions within the meaning of section 1(3)(b) of the Act. He exercised effective control and authority over the housekeeping staff of the respondent's 126 room hotel by making effective recommendations to the respondent's Manager, Ward Hagar, with respect to the hiring and discharge of housekeeping staff. Moreover, on at least one occasion he hired an employee on his own initiative without any prior consultation with Mr. Hagar. He also prepared the work schedule for the housekeeping staff and had power to grant time off. It was his responsibility to prepare time sheets indicating the number of hours worked by his staff for payroll purposes. The fact that he also regularly performed non-managerial functions does not detract from the fact that he devoted a significant amount of his time to managerial functions. Accordingly, the position of head housekeeper will be excluded from the bargaining units.
6. Having regard to the partial agreement of the parties concerning the description of

the bargaining units and to the foregoing determination with respect to the managerial status of the head housekeeper, the Board finds that the following constitute units of employees appropriate for collective bargaining:

All employees of the respondent at the Waldorf Astorial Hotel in the Municipality of Metropolitan Toronto, save and except head housekeeper, those above the rank of head housekeeper, office staff, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period (hereinafter referred to as "bargaining unit #1").

All employees of the respondent at the Waldorf Astoria Hotel regularly employed for not more than twenty-four hours per week and students employed during the school vacation period, save and except head housekeeper, persons above the rank of head-housekeeper, and office staff (hereinafter referred to as "bargaining unit #2").

7. In support of this application the applicant filed in timely fashion combination membership applications and receipts for thirteen of the seventeen employees in bargaining unit #1 as of the date of the application and for each of the five employees in bargaining unit #2 as of the date of the application. Thus, the applicant would under normal circumstances be entitled to a certificate for each bargaining unit without a representation vote. However, the respondent submits that this application should be dismissed because the membership evidence does not represent the true wishes of the employees. The respondent alleges that Mr. Harris represented himself to employees in the bargaining units to be acting on behalf of management in soliciting the membership evidence filed in this matter, and induced employees to join the applicant by telling them that management wanted them to join the applicant and that he and they might be discharged if they did not join the applicant.

8. In support of its allegations, the respondent called as witnesses Mr. Hagar and two assistant housekeepers employed at its hotel, Elizabeth O'Neill and Muriel Grigg. Ms. O'Neill and Ms. Grigg testified that they were approached by Mr. Harris during working hours on June 17, 1981 and requested to accompany him to his office. After they entered his office, he told them that he was forming a union for the employees at the hotel because he thought it would be good for the employees to have a union as they would probably get a raise in a pay, a dental plan and other benefits if they unionized. When Ms. O'Neill asked him if Mr. Hagar knew about the union, Mr. Harris said that Mr. Hagar was not aware of it but that he intended to talk to him about it later. Before leaving the office, Ms. O'Neill and Ms. Grigg each signed an application for membership in the applicant union and paid \$1.00 to Mr. Harris who gave them receipts for the payment. On Mr. Harris' instructions, Ms. O'Neill told other chambermaids employed by the respondent to go down to his office one at a time. It was her evidence that she saw "two or three of the girls" go into his office individually, where they met with him with the door shut. Ms. Grigg told the Board that Mr. Harris said that he wanted to meet with the employees one by one in his office because he "didn't want anybody to know what was going on".

9. Ms. O'Neill testified that on the following day, she and Ms. Grigg discussed the union and were "a bit upset because [they] didn't know if Ward (Hagar) knew about it or not". It was her evidence that they wanted Mr. Hagar to know about the union because they felt that

they “should have respect for him” because he was their boss. Ms. Grigg testified that she “changed her mind” about the union because she “didn’t think about it too much when [she] signed” and subsequently concluded that she had been too hasty in signing. She explained that she did not think that it was fair to “go behind the back” of the new owner who had just bought the hotel two weeks earlier, and “didn’t think it was fair to the Manager because he was good to [her]”. She also testified that she was afraid that she might lose her job if management found out that she had signed. As a result of their concerns, Ms. O’Neill and Ms. Grigg entered Mr. Harris’ office when he was not there and retrieved from his file cabinet the union cards which they had signed on the previous day. On June 19, 1981 when Ms. O’Neill told Mr. Harris what she and Ms. Grigg had done, he said: “I don’t believe it. I didn’t think you would do that to me.”

10. On June 20th, Ms. O’Neill and Ms. Grigg met with Mr. Harris in the lunchroom near his office. Mr. Harris told them that if they joined the union, their jobs would be more secure. He also told them: “If you don’t join the union, I’ll lose my job first and you probably will lose yours next.” Ms. O’Neill and Ms. Grigg understood him to mean that he might be discharged if management found out that he was organizing a union and that unionization would give them all greater job security. He also told them that he had “made up the work schedule for a couple of weeks in advance” because of his concern that he might be discharged. Although Mr. Harris told Ms. O’Neill that management could not dismiss an employee for joining the union, she admitted in cross-examination that she was “somewhat concerned” that she might lose her job if management found out that she had signed a union card. She also testified that she “wanted to know if Ward Hagar was for it”. After discussing once again the potential benefits of unionization, Mr. Harris asked Ms. Grigg if she would sign a card if he discussed the union with Mr. Hagar and he was in favour of it, to which she replied in the affirmative. Mr. Harris then went away for approximately forty-five minutes. When he returned, he told Ms. O’Neill and Ms. Grigg that Mr. Hagar had said that “personally” he thought it was a good idea but as Manager he had to say no because it was his job. After further discussion, Ms. O’Neill and Ms. Grigg signed two of the eighteen membership cards that were subsequently filed by the applicant in support of this application. In explaining her decision to sign another card, Ms. Grigg testified (during examination in chief): “The Manager knew about it. There was no danger to lose my job.” During cross-examination, she told the Board that if she had thought that management “didn’t like a union” she would not have signed. She also stated: “Ward’s a fair man. If it would be good for us, he’d be for it. If it wasn’t, he’d say no.”

11. Mr. Hagar testified that Mr. Harris approached him sometime during the week in question and asked him what his position would be on a union in the hotel. He also testified that Mr. Harris did not tell him that he (Mr. Harris) was the organizer but did tell him about the prospective benefits of unionization which were being mentioned to employees by the person who was “signing people up”, whom Mr. Hagar understood to be someone other than Mr. Harris. It was Mr. Hagar’s uncontradicted evidence that he told Mr. Harris that he was not in favour of unionization. He also told Mr. Harris that the hotel could not afford the things that were being held out to employees as potential benefits of unionization.

12. Mr. Harris, who was dismissed by the respondent near the end of June of 1981, did not testify in these proceedings. Although Mr. Harris was present in the hearing room on the first day of hearing (July 10, 1981) when the Board announced that the hearing would continue at 9:30 a.m. on September 10, 1981, and that the applicant would be afforded an opportunity

to call evidence at that time, he did not attend the continuation of hearing and counsel for the applicant advised the Board that he had been unable to ascertain the whereabouts of Mr. Harris, who served as the collector on each of the cards submitted by the applicant with the exception of his own card. In view of the absence of Mr. Harris, counsel for the applicant (who made no request for an adjournment) elected to call no evidence and proceeded to argue the case on the basis of the evidence of the three witnesses called by the respondent.

13. Counsel for the respondent contended that the Board was precluded from certifying the applicant by section 12 of the Act, which provides in part as follows:

“The Board shall not certify a trade union if any employer or any employers’ organization has participated in its formation or administration or has contributed financial or other support to it . . .”

14. A finding by the Board that a person who actively participated in the formation of a trade union, or in the collection of membership evidence in support of a trade union, exercises managerial functions under section 1(3)(b) of the Act does not in and of itself activate section 12 of the Act. For section 12 to be applicable, such finding must be coupled with evidence that establishes that the person in question was acting on behalf of or in the interest of the employer (see *Children’s Aid Society of Metropolitan Toronto*, [1976] OLRB Rep. Nov. 651). In *National Dry Company Limited*, [1980] OLRB Rep. Aug. 1217, at paragraph 12, the Board described the purpose and scope of section 12 as follows:

“That provision is intended to prevent the certification of unions which are in less than an arm’s length relationship with the employer. In other words, it is aimed at preventing the establishment of ‘sweetheart unions’. It is not uncommon for persons in the gray area at the fringes of management . . . to get involved, sometimes deeply, in a union. (See *Toronto Children’s Aid*, [1976] OLRB Rep. Nov. 651; *Kelly Funeral Homes Limited*, [1973] OLRB Rep. Feb. 87; *S. D. Adams Welded Product Ltd.*, [1978] OLRB Rep. April 353). Less often, but occasionally, persons of clearly managerial rank lend their support to a union’s campaign to organize their employees. (See *Casimir, Jennings and Appleby*, [1978] OLRB Rep. June 507 affirmed in an unreported decision of the Supreme Court of Ontario (Divisional Court) dated July 11, 1978). That, of itself, does not raise a section 12 bar to certification, not does it necessarily cast any doubt upon the validity of membership evidence. Where the evidence establishes that the foreman or manager was clearly acting contrary to the employer’s interests and would have been seen to be so motivated by any reasonable employee, the fundamental concern about a ‘sweetheart union’ underlying section 12 of the Act does not arise. When that is the case the section 12 bar to certification does not arise and there is no reason to presume, absent substantial evidence to the contrary, that the employees were subjected to undue influence in their decision to join a union.”

15. In the present case, although Mr. Harris exercised managerial functions, it is clear from the evidence that he was not acting on behalf of or in the interest of the respondent employer but rather was acting contrary to the employer’s interests. Counsel for the

respondent argued that section 12 could apply whether or not Mr. Harris was actually acting on behalf of the employer, so long as he was perceived by the employees to be acting on behalf of the employer. It is questionable whether section 12 extends as far as counsel contends. However, it is unnecessary to express a final view on that issue in the present case since we are satisfied, having regard to all of the evidence, that although Mr. Harris was perceived by the employees of the respondent who testified before the Board in these proceedings (whose perceptions, in the absence of evidence to the contrary, the Board assumes to be similar to those of the other employees of the respondent) to exercise some managerial functions, those employees could not reasonably have perceived, and did not in fact perceive, Mr. Harris to be acting on behalf of the respondent in attempting to persuade them to sign membership cards in the applicant. Mr. Harris' obvious attempts to maintain the secrecy of his activities and his express concern that he might be discharged if management became aware of his union activities are inconsistent with any perception that he was acting on behalf of the respondent in soliciting membership evidence. Even the statement which he attributed to Mr. Hagar made it clear that "management" was opposed to the union, albeit that Mr. Hagar was falsely said to have been favourable to the union in his personal (non-managerial) capacity. Indeed, the evidence as a whole establishes that Ms. O'Neill and Ms. Grigg were aware at all material times on June 20, 1981 that one of the reasons that Mr. Harris wanted them to sign union cards was to protect him against the possibility of being dismissed for his organizational activities. For the foregoing reasons, section 12 does not preclude the Board from certifying the applicant in the instant case.

16. Counsel for the respondent further contended that even if section 12 is inapplicable, the application should be dismissed because (it is alleged) the employees thought Mr. Harris was acting on behalf of management, and, accordingly, the membership evidence cannot be relied upon as being representative of the true wishes of the employees. However, as discussed above, the evidence indicates that the organizational activities of Mr. Harris clearly were in fact, and in the perception of the employees who testified in these proceedings, a "frolic of his own". On the basis of the evidence before us, we are satisfied that no reasonable employee would have perceived Mr. Harris to be acting on behalf of management in attempting to obtain support for the applicant trade union. Nevertheless, we are concerned about some of the campaigning tactics adopted by Mr. Harris. It has long been the Board's practice not to give any weight to membership evidence obtained by the use of threats of loss of employment (see, *Chemtrusion Inc.*, [1979] OLRB Rep. Dec. 1150; *Intermodal Marine Servs Ltd.*, [1979] OLRB Rep. Apr. 321; and cases cited therein). Although we are satisfied on the evidence before us that Mr. Harris' statement to Ms. O'Neill and Ms. Grigg that if they did not sign union cards he would be discharged first and they would probably be discharged next, was not one of the considerations which prompted them to sign membership cards on June 20, 1981, in the absence of testimony by Mr. Harris the Board is left with some concern that similar statements may have been made to and acted upon by some of the other employees who signed cards. This possibility, coupled with Mr. Harris' misrepresentation to Ms. O'Neill and Ms. Grigg concerning Mr. Hagar's "personal" view with respect to the desirability of unionization of the hotel, has led us to conclude that the membership evidence collected by Mr. Harris in support of this application requires the confirmatory evidence of a representation vote.

17. For the foregoing reasons, the Board, in the exercise of its discretion under section 7(2) of the Act, directs that representation votes be taken of the employees of the respondent in bargaining units #1 and #2. All employees of the respondent in bargaining unit #1 and in

bargaining unit #2 of the date hereof who do not voluntarily terminate their employment or who are not discharged for cause between the date hereof and the date the votes are taken, will be eligible to vote. Voters will be asked to indicate whether or not they wish to be represented by the applicant in their employment relations with the respondent.

18. This matter is referred to the Registrar.
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**1768-80-R Canadian Food and Associated Services Union, Applicant,
v. Windsor Arms Hotel Limited, Respondent.**

Certification – Employee – Evidence – Whether captain waiters and assistant maitre'd exercising managerial functions – Union having agreed to exclusion in previous application – Whether estopped from asserting employee status in subsequent application

BEFORE: R. O. MacDowell, Vice-Chairman, and Board Members B. L. Armstrong and J. A. Ronson.

APPEARANCES: *M. Cornish and W. Iler for the applicant; I. T. Bern for the respondent.*

DECISION OF THE BOARD; September 9, 1981

1. This is an application for certification.
2. This matter originally came on for a hearing on November 13, 1980. At that hearing, the parties were able to resolve many of the matters in dispute between them; however, there remained a question concerning the employee status of certain named individuals and, in accordance with its usual practice (and the agreement of the parties), the Board appointed a Labour Relations Officer to inquire into the duties and responsibilities of the disputed individuals, and to report back to the Board. When the parties met with the Officer, they were able to further narrow their dispute, so that it now appears that the only outstanding questions before the Board are:
 - (a) whether, in the opinion of the Board, the “captain-waiters”, and the assistant maitre d’hotel exercise managerial functions and thus cannot be considered employees within the meaning of the Act; and
 - (b) if these persons, or some of them are “employees” within the meaning of the Act, whether the applicant is estopped from applying to represent them.
3. The evidence before the Officer was transcribed and issued as a formal report. The parties were given the opportunity to make their representations to the Board concerning the conclusion which it should reach in light of this evidence. A hearing for this purpose was conducted on June 18, 1981. At that hearing the respondent requested an adjournment so that it could obtain the presence, and evidence, of another witness. The request was denied. In

the opinion of the Board the respondent had already had an ample opportunity to lead its evidence, the witness could have been available for the June 18th hearing but was not, and the matter had already been considerably delayed. The Board was not disposed to permit it to be delayed any further, and in consequence, the evidence upon which the Board's decision is made is that contained in the Labour Relations's Officer's report.

4. The relevant provision of *The Labour Relations Act* is as follows:

1.-(3) Subject to section 80, for the purposes of this Act, no person shall be deemed to be an employee,

(b) who, in the opinion of the Board, exercises managerial functions or is employed in a confidential capacity in matters relating to labour relations.

5. The managerial status issue does not raise any novel question of law, nor are the facts especially complicated. The task facing the Board is simply to weight the factors which point in one direction against those which point in the other, and assess the evidence in light of the statutory purpose which section 1(3)(b) was designed to accomplish. We do not think any useful purpose would be served by reviewing, once again, the Board's jurisprudence concerning section 1(3)(b). (See for example *The Cottage Hospital*, [1980] OLRB Rep. March 304, *Caledon Hydro*, [1979] OLRB Rep. Oct. 924, and the many cases digested in Sack & Levinson *Ontario Labour Relations Board Practice*.) It is sufficient to note that in the case of so-called "first line" managerial employees, the important question is the extent to which they make decisions which affect the economic lives of their fellow employees thereby raising a potential conflict of interest with them. Thus, the right to hire, fire, promote, demote, grant wage increases or discipline employees are all manifestations of managerial authority, and the exercise of such authority is incompatible with participation in trade union activities as an ordinary member of the bargaining unit. In the present case however, these managerial functions appear to be exercised by Angelo Vitale, the "Maitre d'", and the disputed individuals have virtually no involvement other than occasionally reporting a situation to Vitale for him to assess and act upon as he sees fit. Having regard to the totality of the evidence, it is the opinion of the Board that neither the assistant maitre d'hotel nor the captain-waiters exercise managerial functions within the meaning of section 1(3)(b) of the Act.

6. A more difficult question is the respondent's alternative submission; namely, that even if these individuals are "employees" within the meaning of the Act, the applicant is precluded from applying to represent them because of an agreement which it made some three years ago. The facts in support of this contention are not in dispute.

7. In 1977 the applicant applied to be certified as bargaining agent for a large group of the respondent's employees. The group which it sought to represent, (and, consequently, its proposed bargaining unit) *excluded* the captain waiters and assistant maitres d'hotel who are affected by the current application. The respondent's reply to the application likewise proposed a bargaining unit which *excluded* these individuals. Initially the issue was not in dispute.

8. The major issue arising on the 1977 application involved the scope of the bargaining rights held by Local 280 of the Bartenders' Union which represents some of the respondent's

employees. There is no doubt, however, that at some point, despite the respondent's reply, a question arose concerning the status of the individuals whom the union now seeks to represent. It was the union's view that these persons (or some of them, at least — the record is not entirely clear) were "captain waiters" exercising managerial functions. It was the respondent's position that they were not captain waiters and did not exercise managerial functions. But this issue was not the parties' principal concern; nor the primary focus of the enquiry undertaken by a labour relations officer pursuant to a decision of the Board dated September 19, 1977. It is apparent from a perusal of paragraph 8 of that decision that the main issue remained whether a number of waiters — including those affected by the current application — were already represented by another bargaining agent. It is also clear that a determination of the status of the individuals the union now seeks to represent would have had no effect on its right to certification.

9. Since the resolution of this employee status issue could not affect the outcome, the applicant regarded the captain waiters as managerial, and as the captain waiters themselves had evinced no particular interest in trade union representation, the parties were content to agree that they should be excluded from the bargaining unit. There was no Board determination of the issue. Now, of course, the union is seeking to represent persons who some three years ago it did not regard as employees under the Act and agreed to exclude. The union changed its position following a closer examination of the employees' duties which it undertook after they approached it seeking representation. The respondent, it will be observed, has also changed its perception of the employees' status.

10. The first collective agreement between the parties ran from August 1979 until August 1980. The recognition clause followed the Board certificate and excluded the assistant maitres d'hotel and captain waiters. A second agreement in the same terms was signed in October 1980 covering the period August 1980 to August 1981. Throughout this period there has been no change in the duties and responsibilities of the disputed individuals — demonstrating, ironically, the accuracy of the respondent's initial assessment of their status. They do not now, and did not then, exercise managerial functions which require their exclusion from the ambit of collective bargaining. Nor is there any evidence that the respondent has altered its method of operation or otherwise acted to its detriment as a result of the parties' 1977 agreement. No doubt the agreement of the parties avoided the necessity of litigating a peripheral issue, but it is difficult on the evidence before us to discern any other consequence to the parties flowing from it.

11. The respondent takes the position that the union cannot resile from its earlier agreement — at least not until the expiry of the current agreement between the parties (i.e. August 4, 1981). The respondent argues that the present certification application is "untimely" and should be dismissed. The union contends that the Board has no jurisdiction to impose timeliness conditions other than those already expressly set out in the Act (see sections 5 and 53); and, further, that there is no prejudice to the respondent in proceeding with the instant application. The employees do not exercise managerial functions, and if the respondent wishes to reorganize its operation so that they actually do possess managerial authority, it remains free to do so. The agreement to exclude the disputed individuals three years ago should not impede their right to join a trade union now.

12. The issue posed by the respondent is a difficult one because there are many situations in which a union will obtain a certificate or avoid a representation vote because of

the parties' agreement with respect to the status of disputed individuals. It smacks of abuse of process when a union agrees that certain individuals are not employees in one application, then asserts precisely the opposite in a later application. Whether or not a concept analogous to *res judicata* applies, and even if the agreement has not permitted a union to get a certificate or obtain some other concrete advantage, an agreement entered into by a party before the Board should have some substance, and it is arguable that it should not be swept away by the simple expedient of filing a second certification application. On the other hand, persons who are employees have a right to organize and bargain collectively. When there has been no formal determination of their status by the Board, why should they be prevented from being represented by the union of their choice? The employees in the instant case were not party to the earlier proceedings or agreement; and while such agreements are obviously desirable to avoid protracted litigation, an unduly rigid interpretation of their effect on future proceedings may pose as great an impediment to agreement as an approach which is too lax. In both cases, parties may be prompted to litigate the issue rather than agree. Moreover, from an industrial relations point of view, there may be a real disadvantage to erecting any absolute bar. Employees who wish to engage in collective bargaining may simply seek out a new union — thereby fragmenting the bargaining structure and introducing two unions in a situation where, in all likelihood, collective bargaining stability and industrial peace would be enhanced if there were only one.

13. Issues such as this do not arise very often on certification applications, but they are not uncommon in applications under 95 of the Act. If during collective bargaining or the operation of a collective agreement “a question arises between the parties” as to whether an individual is an employee under the Act, section 95 permits the parties to refer the matter to the Board for its determination. Where the employment status of such person had once been settled by a collective or other form of agreement, the Board at one time refused to permit either party to ever unilaterally withdraw from that agreement by means of an application under section 95 — on the theory that, in the absence of some change in the individual's duties, a party could not claim that a “question” existed. More recently, however, the Board has liberalized this policy (see: *Westmount Hospital* [1980] OLRB Rep. Oct. 1572), and at least two cases suggest even more latitude to re-examine a status issue in an application for certification.

14. In *City of St. Catharines* [1966] OLRB Rep. July 270, the Board had before it a fact situation which was very similar to the one in the instant case. On an initial certification application and acting on the agreement of the parties, the Board has excluded certain people from the scope of the bargaining unit. That exclusion was also written into the recognition clause of the parties' collective agreement which (as in most cases) was framed in the same terms as the certificate. Subsequently, the union brought a section 79(2) [now section 95] application in respect of the excluded group. In dismissing that application the Board made the following observations (emphasis added):

Again, in a proper case, a decision of the Board as to the status of certain persons may be of assistance to the parties in negotiating a new collective agreement, i.e., where the extent of the bargaining rights that the union has at that time is in issue. The section ought not to be used, however, to enable an application to pave the way for what is in effect a request for voluntary recognition of a union as bargaining agent for a group of employees not presently covered by an agreement, i.e., as a substitute

for a certification application. In one sense, a question may be said to arise in such circumstances as to the status of certain persons but, in our opinion, that is not the sense in which the phrase is used in section 79(2) of the Act. What useful purpose in furtherance of bargaining for a collective agreement could be served by a determination of this Board as to the status of the seven persons here under consideration? The only purpose that readily comes to mind is that the union might seek to have the employer agree to widen the scope of the bargaining unit defined in the collective agreement to include any of the persons whom we might find to be employees. However, the union could not insist on their inclusion in the agreement as a matter of right. *The union is not without remedy. It could apply to the Board to be certified as bargaining agent on behalf of such persons, and on an application of that nature, the union would legitimately be entitled to a ruling as to their status.*

Although these remarks are undoubtedly “obiter”, they do speak to precisely the situation which is currently before the Board.

15. The same issue arose tangentially in *McIntyre Porcupine Mines Limited* [1975] OLRB Rep. Apr. 261. That case involved an application for certification of shift bosses and foremen who had been excluded from the union’s initial certificate many years before, as well as from a number of subsequent agreements between the parties. The employer took the position that the matter was “res judicata” or that, in the absence of changes in duties, the union was estopped from seeking certification. The Board reviewed a number of the decisions under 95(2) but pointed out that the real rationale for the restrictions imposed was to prevent “unfair advantage” — as, for example, in *Davis Lumber Ltd.* 59 CLLC, ¶18,148, where the union had avoided a representation vote by agreeing to exclude certain persons from the unit, then subsequently sought to resile from that agreement by way of a section 95(2) application. In the absence of tangible prejudice to the respondent or unfair advantage to the applicant, the Board suggested that it should be reluctant to impose a bar which excludes people from the right to participate in collective bargaining through the bargaining agent of their choice:

Therefore, the *Davis Lumber Co. Ltd.* case (supra) stands for the proposition that a party will not be allowed to gain an unfair advantage by way of a section 95(2) application; But even if we were to conclude that the *Davis Lumber Co. Ltd.* doctrine ought to prevent even a subsequent application for certification by a party to an earlier exclusionary agreement, the respondent in this case has failed to establish that the applicant is gaining some kind of an unfair advantage by reason of this application for certification. For example, in the *Davis Lumber Co. Ltd.* case the trade union had avoided a representation vote by agreeing to the exclusion of all foremen and for this reason the Board responded as it did. . . . It can also be argued that if a respondent cannot point to substantial prejudice the Board ought not to hold parties to the terms of an earlier bargain where that bargain deprives a group of persons the very coverage of the Act and, as noted above, the respondent has not established any such prejudice.

(See also: *Globe & Mail Limited* [1976] OLRB Rep. Nov. 662)

16. In the instant case, the union has not gained any unfair advantage from its agreement three years ago to exclude the disputed individuals from the scope of its certificate, nor has there been any detrimental reliance or prejudice to the interests of the employer. The respondent's original position, it will be recalled, was that these individuals were all employees (as indeed they are), but although it takes a different position in the current application, there is no evidence that it has relied upon the earlier agreement to its detriment or suffered any bargaining or other disadvantage. It might be argued that to certify another small pocket of the respondent's employees while the bulk of them remain bound by a collective agreement, would create collective bargaining difficulties for the respondent arising from the fragmented bargaining structure; however, even this poses no problem in the instant case because by the time this decision issues, the main agreement will have expired, and the parties will be in a position to negotiate a single comprehensive agreement if they wish to do so. In the circumstances, it would be entirely artificial to accede to the respondent's request and dismiss the application, when, if the respondent's argument is fully accepted, it could immediately be refiled. There may well be cases where it is appropriate to hold a party to its earlier agreement, and decline to entertain a new application for certification — and this is especially so where the agreement is very recent and the union can be said to have gained an "unfair advantage", or the respondent can demonstrate real prejudice. That is not the situation in the present case, however, and we are satisfied that we should proceed with the application on its merits.

17. The Board finds that the unit of employees appropriate for collective bargaining includes:

"all employees of the respondent in the Municipality of Metropolitan Toronto, employed at the Windsor Arms Hotel, Noodles, and the Bay Streetcar, save and except supervisors and assistant supervisors exercising managerial functions, persons above the rank of supervisor and assistant supervisor, office staff, musicians, management trainees, maître d'hôtel, chefs, sous-chefs, chefs de parties who exercise managerial functions, persons regularly employed for not more than twenty-four hours per week, students employed during the school vacation period and employees covered by subsisting collective agreements."

Clarity note: The parties are agreed that as of the date hereof the persons occupying the categories of maitre d'hotel, chefs, and sous-chefs, exercise managerial functions within the meaning of section 1(3)(b) of *The Labour Relations Act*. The parties are further agreed that as of the date hereof the assistant maitres d'hotel other than John Darocha exercise managerial functions and are excluded from the unit on that basis.

18. On the basis of the evidence before it, the Board further finds that more than fifty-five per cent of the employees in the above described bargaining unit were members of the applicant on November 26, 1980, the terminal date fixed for this application and the date which the Board determines pursuant to section 92(2)(j) of the Act to be the time for ascertaining membership under section 7(1) of the Act.

0429-81-M Douglas N. Butler, Applicant, v. The York University Faculty Association, Respondent, v. **The Board of Governors of York University**, Respondent.

Religious Exemption – Whether belief must form part of dogma of established sect or group – Board distinguishing between “religious” and personal belief – Whether exemption permanent or limited to duration collective agreement

BEOFRE: M G. Mitchnick, Vice-Chairman, and Board Members E. J. Brady and W. F. Rutherford.

APPEARANCES: *G. Vandezande for the applicant; G. Charney, Q.C., J.L. Granatstein and Elizabeth Lander for the respondent union; no one for the respondent employer.*

DECISION OF THE BOARD; September 28, 1981

1. This is an application for religious exemption made pursuant to the provisions of section 39 of *The Labour Relations Act*. It is the first of several applications presently filed with the Board by individuals seeking relief from the compulsory check-off provisions of the collective agreement recently negotiated by the respondent York University Faculty Association and York University. Section 39 of the Act provides:

39.-(1) Where the Board is satisfied that an employee because of his religious conviction or belief,

- (a) objects to joining a trade unions; or
- (b) objects to the paying of dues or other assessments to a trade union,

the Board may order that the provisions of a collective agreement of the type mentioned in clause *a* of subsection 1 of section 38 do not apply to such employee and that the employee is not required to join the trade union, to be or continue to be a member of the trade union, or to pay any dues, fees or assessments to the trade union, provided that amounts equal to any initiation fees, dues or other assessments are paid by the employee to or are remitted by the employer to a charitable organization mutually agreed upon by the employee and the trade union, but if the employee and the trade union fail to so agree then to such charitable organization registered as a charitable organization in Canada under Part I of the *Income Tax Act* (Canada) as may be designated by the Board.

(2) Subsection 1 applies,

- (a) subject to clause *b*, to employees in the employ of an employer at the time a collective agreement containing a provision of the kind mentioned in subsection 1 is first entered into with that employer and only during the life of such collective agreement; and

- (b) where a collective agreement in force before the 15th day of February, 1971 contains the provision mentioned in subsection 1, to employees in the employ of the employer on the 15th day of February, 1971 and only during the life of such collective agreement,

and does not apply to employees whose employment commences after the entering into of the collective agreement when clause *a* applied, or on or after the 15th day of February, 1971, when clause *b* applies.

Section 38(1)(a) provides:

38.-(1) Notwithstanding anything in this Act, but subject to subsection 4, the parties to a collective agreement may include in it provisions,

- (a) for requiring, as a condition of employment, membership in the trade union that is a party to or is bound by the agreement or granting a preference of employment to members of the trade union, or requiring the payment of dues or contributions to the trade union.

2. The collective agreement giving rise to this problem is the third in a series of collective agreements involving these parties. While the first two agreements contained a provision generally requiring the check-off of union dues, it also permitted employees to "opt out" simply by filing a declaration based on "religious belief or personal conviction". The Relevant portion of those collective agreement read as follows:

4.01 The Employer shall, once in each month during the life of this Agreement, deduct from salary of each member of the bargaining unit who, as of the date of signing of this Agreement, is a member of the Association, or who subsequently becomes a member of the Association, such fees, monthly dues, or assessments as may be authorized from time to time by the Association and certified in writing to the Employer by the Association.

4.02 The Employer shall make the same deductions from the salaries of employees, who, as of the date of signing of this Agreement, are not members of the Association, provided that any such employee, by 15 January 1977, may file with the Employer a declaration stating that he/she does not, on grounds of affirmatively expressed religious belief or personal conviction, desire such monies to be remitted to the Association, in which case an equivalent amount shall be remitted to a bursary/scholarship fund as specified in Appendix B.

...

4.04 The declaration shall express clearly the grounds of the belief or conviction, and a copy thereof, if accepted by the Employer, shall be forwarded to the Association by the Employer.

Counsel for the respondent concedes that the exemption granted under those provisions, subject to the required declaration being filed, was automatic. Counsel argues, nevertheless, that the provisions of the earlier collective agreements “required” the deduction of dues in the sense contemplated by sections 39(1) and 38(1)(a) of the Act, and accordingly, that this application for exemption could only have been brought, pursuant to section 39(2)(a), during the term of the original collective agreement between the parties. The Board does not agree. A provision in a collective agreement which has the effect of granting an exemption cannot be said to “require” the payment of dues. The section surely does not contemplate that an individual who has yet to experience any difficulty with a clause requiring him to join or pay dues to a trade union must bring an application at that time, or be forever barred. It is only the most recent collective agreement concluded by the parties which has removed the “opting out” provision from Article 4, and it is only this collective agreement which contains a clause that in fact requires the applicant to pay dues.

3. The respondent in support of its initial submission argues that the exemption available under the Act lasts only for the duration of one collective agreement, and that the present applicant has already, through the voluntary act of the parties in providing for opting-out in the initial collective agreement, had the benefit of such an exemption. The respondent relied in this regard on a decision of the Board, written by the same chairman as on the present panel, in *Lloyd C. Hewitt*, [1980] OLRB Rep. Jan. 126. That case did observe that the duration of the exemption appeared to be for one collective agreement only, in effect permitting an employee faced with an unanticipated change in working conditions a period of time to work out his conflict or find other employment. That point was not specifically in issue in *Lloyd C. Hewitt*, however, nor did not Board have the benefit of legal argument in coming to the conclusion that it did.

4. It has now been brought to the Board’s attention that the duration of the exemption was in fact placed specifically in issue in one of the Board’s early cases interpreting section 39, and that the Board there came to the conclusion that the section placed no limit whatsoever on the duration of the exemption (once granted). The case was *York County Board of Education*, [1973] OLRB Rep. June 357, and held as follows, at paragraph 7:

We further find that section 39 of The Labour Relations Act in no way limits the duration of the exemption granted to the applicant pursuant to the provisions of section 39. . . . When the Board ordered and directed that the provisions of the collective agreement between the respondent employer and the respondent trade union . . . do not apply to the applicant, the Board intended the article “the” to mean “any”.

and at paragraph 9:

Before leaving this matter it is noted that if effect were given to the respondent trade union’s argument, the provisions of section 39 of the Act would only be for the duration of a single collective agreement since the provisions of section 39(2)(a) would preclude a subsequent application following the renewal of the collective agreement which is first entered into containing provisions of the type mentioned in clause (a) of subsection (1) of section 38 of the Act. Such a restrictive interpretation of section 39 would be inconsistent with what we understand to be the purpose and intent of the provisions of section 39.

The issue of course is whether the words "and only during the life of such agreement" in subsection (2) of section 39 qualify the effect of the exemption granted itself, or only the time within which an application may be brought. The *York County* case found it to be the latter, and this interpretation appears to be the correct one. While subsection (2) does not happen to be framed in the manner generally employed to prescribe time limits within which applications may be brought, either in statutes generally or elsewhere in *The Labour Relations Act* itself, it may be noted that subsection (2) is essentially procedural in nature, setting out the class of persons entitled to bring the application described in subsection (1). It would appear that the legislative draftsman, having prescribed *who* may bring the application contemplated by the section, went on to prescribe *when* it might be brought. This conclusion of the Board in the *York County* case was expressed in 1973, and, apart from the recent *obiter* remarks contained in *Lloyd C. Hewitt*, has stood the test of time. The Board accordingly reaffirms the interpretation of section 39(2) that no limit has been placed on the length of time during which an exemption granted under the section continues to operate.

5. The Board turns now to a consideration of the merits of the present application. The applicant, Douglas Butler, is a full-time professor appointed to the York faculty in 1968. He has never belonged to any trade union, nor even to the informal faculty association which preceded the respondent at York. Dr. Butler was raised in what he describes as a "Christian" family, and formerly was a member of the Seventh Day Adventist Church. Dr. Butler has ceased to be a member of that Church as of 1964, preferring to modify and personally assess certain of their positions on his own. He credits that Church with providing the underpinnings of many of his current beliefs concerning the relationship between God and man. He continues to attend church from time to time each year, but does not rely on any proscription in the dogma of the Seventh Day Adventist Church to justify the present application. In the view of Dr. Butler, a man's first duty is to serve God. To do so, an individual must proceed in a way which does not violate his own conscience. An individual's relationship with God, as Dr. Butler sees it, must be governed by the individual's own will: he must refuse to submit it to the will of others in a group, who may vote as they see fit. Dr. Butler testified that he has always refused to join any form of organization, in order to leave himself free to follow the dictates of his conscience. Asked how he is able to submit to the will of government in his everyday life, Dr. Butler responded that he has no choice in the matter, and that he can only pray that the leaders of government will follow a course of action, compatible with his own beliefs. Asked whether he is offended, for example, by his tax money being used to buy armaments, Dr. Butler indicated that he is, but that he feels that is in the hands of God, and beyond his own control. Dr. Butler has never been a member of a political party, and has never voted.

6. One of the things which are not compatible with Dr. Butler's own convictions are trade unions. As a form of organization, the individual will is clearly subverted to that of the majority. He believes that he cannot let "a group of people dictate the direction of my life". Apart from that, Dr. Butler objects to the adversarial nature of the trade union movement, and objects in particular to the use of the strike weapon. In the university context, Dr. Butler has expressed his fear that trade unionism will destroy the collegiality of the academic institution. He decries the call by the respondent for "job action", and, in particular, the withholding of students' grades, and condemns the goals of the respondent as unduly materialistic. He further finds that the trade union's support for such items as seniority, tenure and uniform increases tend to de'emphasize merit in the profession and point instead toward mediocrity. Dr. Butler abhors the idea of individuals in an academic institution being forced to submit to an organization against their will, and feels that the trade union in general has demonstrated a

tendency away from rather than in support of academic freedom. Dr. Butler has, in various discussions with Jack Granatsein, the President of the York University Faculty Association, articulated these specific objections to the goals and methods of the trade union.

7. Dr. Butler's antipathy toward trade unions goes back a long way. When he was sixteen, he asked his father, a minister, what line of profession he ought to pursue, in order to avoid having to become involved with trade unions in the future. When the respondent began its efforts to organize the faculty of York University into a recognized form of trade union, Dr. Butler was one of those who led the opposition. This dissident group formed itself into an unstructured association called the Independent Faculty Members, and waged a long and bitter battle to block the respondent's efforts at certification. Dr. Butler was one of those appearing on behalf of the dissenters at the hearings before the Board. Following certification, the respondent's collective agreement called for the deduction of union dues, but, as noted, a provision existed for exemption on grounds of "religious belief or personal conviction". Dr. Butler successfully applied for exemption in January of 1977, on the basis of the following declaration, drafted in part by his solicitor, but the last paragraph of which is his own:

I, D. N. Butler, of the Faculty of Science, York University, hereby notify the University that I do not wish any salary deduction to be made from monies that are owed to me or may in the future be owed to me by the University for the purpose of fees, assessments or dues specified by the York University Faculty Association.

I make this notification pursuant to the provisions of a purported Collective Agreement between York University and the York University Faculty Association without prejudice to my right to object to the validity of such Agreement at any time. I further request that if any monies are deducted from monies owed to me in lieu of Association dues, fees or assessments pursuant to the provisions of the purported Collective Agreement, such monies be paid into the *Ruth Hill Memorial Scholarship Fund* referred to in the purported Collective Agreement.

I base this declaration on my strong personal conviction that as an institution for the advancement of human culture, the University must respect the individual's conscience and integrity. I believe that in such a context, the application of the Ontario Labour Law enforcing mandatory membership in the Bargaining Unit, is totally abhorrent to my conscience and inimical to the University's best interest. I would gladly forego the "advantages" of collective bargaining for the right to remain independent of its authority.

8. In the second round of negotiations, there apparently was talk of the provision for exemption being eliminated. Consequently, a petition was circulated in May of 1978 seeking to head off such modification to the collective agreement. The petition was directed to the Chairman of the Board of Governors of the University, and implored the University not to agree to any elimination of the freedom of choice hitherto contained in the collective agreement. The covering letter to the Chairman was signed by five individuals (Dr. Butler not being one them), and stated:

The petition is, we believe, self-explanatory. Since we assume that members of the Board of Governors are committed, individually and collectively as members of the Board and as citizens, to the continuance of academic freedom in York University there is no need for us to repeat here that academic freedom is essential in the life of York University. There may be need, however, to stress the need to respect the conscience of individual members of the faculty and librarians of York University. If academic freedom is to prevail in York University it is essential that the conscience of individual faculty members be respected without exception.

The petition itself stated:

We, the undersigned faculty members and librarians, believe that no person should be compelled to join or contribute funds to the Faculty Union against his or her principles.

The petition was signed by 277 persons.

9. In the course of bargaining for the 1980-82 agreement, however, the "opting-out" provisions was removed from Article 4 of the collective agreement. Dr. Butler on April 29, 1981, wrote to the University the following letter:

I take this opportunity before the signing of the new contract with the York University Faculty Association to state that in good conscience I cannot agree to join or pay dues to this trade union. It is my intention to pursue exclusion from payment of said dues to this trade union under Section 39 of the Labour Relations Act, namely exclusion on the basis of religious conviction.

10. From the preceding chronology of events, it is apparent that Dr. Butler was one of those strongly committed to the struggle against the respondent's bid for certification. That struggle having been lost, Dr. Butler now seeks relief from the Board from any form of support for the respondent trade union. In the circumstances, the respondent's cynicism with respect to the present application is understandable, and the Board must be vigilant in assessing the merits of Dr. Butler's request. One must not fail to recognize, however, that the prior acts of dissent by Dr. Butler may have been motivated by precisely the same "religious conviction or belief" which is said to underlie the present application.

11. The Board in *Helena Wybenga*, [1976] OLRB Rep. Aug. 422 set out the questions which the Board must ask itself about the applicant's beliefs, when considering an application of this kind:

- (a) are they sincerely held;
- (b) are they religious; and
- (c) are they the cause of the objection to paying union dues?

Of these questions, it is often (b) which poses the greatest difficulty. As the Board commented in *Anthony J. Vis*, [1972] OLRB Rep. March 249, at paragraph 9:

9. Second, there is the question of defining a religious conviction or belief. It has been submitted that before the Board can make a determination as to whether an employee has a "religious conviction or belief" it must define "religious". We doubt that we can accomplish this rather herculean task in a manner satisfactory to all. However, there are many cases that do not require an exhaustive definition of "religious" to arrive at a determination. It may be that there are peripheral situations where an applicant's "conviction or belief" must be tested against a definition of "religious" but suffice it to say the applicant in this case does not stand at the periphery of what may be considered to be a "religious conviction or belief". We are satisfied that the applicant would fall within any attempted exhaustive definition of religion that we might make.

The present case, however, does indeed stand at the periphery of what is "religious", and places the Board in the unenviable position of having to pass judgment in that regard.

12. On the basis of the foregoing, counsel for the applicant argues that the beliefs set forth by Dr. Butler are clearly "religious" in nature, and underlie his objection to joining or supporting any trade union. Counsel cites earlier cases of the Board which have indicated that the term "religion" cannot be confined to established sects or churches, but rather can include a set of beliefs personal to one individual. From this, counsel argues that "personally-held beliefs" are the equivalent of "religion", and that an applicant need only satisfy the Board that the beliefs underlying his objection are deeply held to bring himself within the exemption provided by section 39. Counsel for the respondent argues that the submission of the applicant eliminates altogether any significance to the word "religious" in the section, and that that word must be taken to have contemplated beliefs which bear at least some relationship to the commonly accepted meaning of "religion" within the community. What the present applicant espouses, in the view of the respondent, is not "religion" but "life-style", reflecting the same discomfort for having to do things against one's own will which all individuals, including the applicant, must face from time to time in the course of everyday life.

13. That the term "religion" can have a meaning which extends beyond the established views of a particular sect is now beyond doubt, and has been reflected in numerous decisions of the Courts as well as this Board. See, for example, *The Civil Service Association of Ontario (Inc.) v. Anderson* (1976), 9 O.R. (2d) 341; *Funk v. Manitoba Labour Relations Board* (1976), 76 CLLC ¶14,006; *Klaas Stel v. The North York Civic Employees' Union, Local 94, Canadian Union of Public Employees*, [1971] OLRB Rep. July 363; *Vis v. Sheraton-Connaught*, [1972] OLRB Rep. March 249; and *Centennial College*, [1979] OLRB Rep. March 174. On the other hand, it is obviously easier for an applicant to demonstrate, and for the Board to find, a particular belief to be "religious" when it forms a part of the dogma of a group or sect both recognized in society and considered to be religious in the traditional sense. It is this distinction which underlay, for example, the vigorous dissent expressed in the *Centennial College* case, *supra*, at paragraph 4. This, however, is largely a question of credibility. As the Board noted in *Klaas Stel, supra*, at paragraph 35:

It was argued, however, that Stel's evidence or affirmation of belief in the witness box must be tested in terms of the consistency and pervasiveness of the belief, particularly where it was not founded on a creed or tenet of

faith of a particular church. As we indicated above, we not persuaded that these are absolute pre-conditions to the establishment of the religious belief, but they may be useful in some cases where there is a credibility issue.

14. Of greater concern to the Board, however, is the applicant's submission that any deeply-held personal belief is, therefore, essentially "religious" within the meaning of section 39. The Board does not find that its cases have ever extended that far. In *Hogeterp v. UAW v. General Motors*, [1972] OLRB Rep. Feb. 132, on which the applicant relies, the Board stated:

11. However that may be, it is not the religious convictions or beliefs of a certain religious sect that must be determined under section 39 of the Act. The religious conviction or belief on which the objection must be based is the *personal conviction or belief* of the applicant and accordingly is a subjective matter.

(emphasis added)

The Board there, however, was simply reaffirming the aforementioned principle that "religion" may be personal to an individual, and need not be tied to an established religious sect. The Board did not say that the belief of the individual need not be "religious" at all. Similarly, in *Stel*, the first case to be decided by the Board under this section, and relied upon as well by the applicant, the Board referred to a number of dictionary definitions of the word "religion", including:

"related or devoted to the Divine or that which is held to be of ultimate importance" (paragraph 22),

and:

"a *personal set* or institutionalized system of religious attitudes, beliefs and practices" (paragraph 26).

(emphasis from the original)

Once again the Board was simply drawing the distinction between an institutionalized versus a personalized religion, and concluded, at paragraph 26:

In light of all the above considerations, we are unable to conclude that an applicant's religious conviction or belief must necessarily be founded on a tenet or creed of a particular religious faith.

There is, again, no suggestion that the Board need not still determine whether the belief, be it personal or otherwise, is in essence "religious". Indeed, both of the definitions referred to make reference to "the Divine", or to a system of "*religious* attitudes, beliefs and practices", and the words "that which is held to be of ultimate importance" must, in our view, be read in their context. So as not to misinterpret the decision in *Stel*, it is important to note that the Board in that case had no difficulty relating Mr. Stel's beliefs to the Divine, and any of the Board's words *obiter* must be read in the light of this conclusion. As the Board said at paragraph 31:

It seems clear that, based on this testimony or affirmation, Stel objects to joining CUPE because of his religious belief in the sense in which we have earlier defined those words. It is a state of mind that membership in CUPE is inconsistent with his duty to Jesus Christ. There can be little doubt that this relates to the Divine.

15. The Board is *Stel* went on to consider as well the argument that the belief of the applicant was too “secular and selective” to satisfy the meaning of the section. The Board observed:

Counsel’s arguments on the secularity and selectivity of the belief are, in reality, addressed to the reasonableness of the belief. Although there may be many who would not understand Stel’s belief and while there may be many who would find it unreasonable and would strongly disagree with it, it is not for the Board to substitute its view as to what constitutes a religious belief for that of the individual.

Again, however, while recognizing the individual’s right to the subjectivity of his own beliefs, this comment falls short of indicating that the individual’s view need not still be found to be “religious”. As the Board went on to make clear in the same paragraph:

However unreasonable the belief may appear to some, the evidence impels us to the conclusion that Stel does have this belief and it is one *based on his religion*.

(emphasis added)

16. What the applicant is in effect asking the Board to do is to legislate the word “religious” out of section 39 altogether. This is not an appropriate function for the Board. Compromising between freedom of religion and egalitarian support for a trade union obligated by law to represent all employees in a bargaining unit is a delicate social issue (cf. again *Vis, supra*), and falls properly within the purview of the Legislature. Had the Legislature chosen to grant the objection simply on the basis of “personal conviction”, or “genuine belief”, or “matters of conscience”, it could easily have done so. But it did not. The section is not written simply for “conscientious objectors”. As the Ontario Court of Appeal observed in *Donald v. Hamilton Board of Education* [1945] 3 D.L.R. 424, in considering the meaning of “religion” under the *Public Schools Act*, at page 429:

The fact that the appellants conscientiously believe the views which they assert is not here in question.

17. The Legislature having chosen to limit the exemption to matters of “religious” conviction or belief, it is the task of the Board to ascribe some weight to that word, and to attempt to distinguish the “religious” from the “non-religious”. This becomes particularly cogent if the recently-enacted section 36a, 1980, c. 34, s. 2(1), requiring the inclusion in a collective agreement, at the request of a trade union, of a provision effectively requiring all members of a bargaining unit to share equally the costs of their agent, is to maintain its integrity. It is the view of the Board that a conviction or belief, to be “religious” within the meaning of the section, must in some way relate to the more orthodox view of “religion”

prevalent in the community. That is, the beliefs must relate to the Divine (in some form) and man's perceived relationship to the Divince, rather than to concepts which deal only with man-made institutions, and the relationship of men *inter se*. As the High Court of Australia noted in *Adelaide Company of Jehovah's Witnesses Inc. v. The Commonwealth* (1943), 67 C.L.R. 122, at pages 123 and 124, in defining the statutory limits on freedom of religion:

It is true that in determining what is religious and what is not religious the current application of the word 'religion' must necessarily be taken into account.

This is not to say, of course, that moral precepts may not form an important part of any religion. As the Court observed in *Anderson*, 9 O.R. (2d) 341:

It is trite to say that in some circumstances, or with respect to some individuals, matters of morality might well be quite separate and distinct from matters of religious belief. However, it does not follow that a matter of individual morality and conscience may not for some individuals be an important element or tenet in the religious convictions or belief.

Indeed, it might be argued that religion has no greater importance than in the moral precepts which it imparts, and on the basis of which an individual carries out his daily life. The Board is simply observing that the use of the term "religious" in section 39 appears to require more than merely a code of behaviour or system of worldly standards, standing alone. As McRuer C.J.H.C. noted in dealing with the related word, "creed", in *Trenton Construction Workers Association, Local No. 52 v. Tange Company Limited*, 63 CLLC ¶15,459:

Whatever meaning one gives to the word "creed" it must involve a declaration of religious belief. Religious belief, theology and standards of ethical or social conduct are all very different things.

Nor is it sufficient for an applicant simply to state that his worldly standards evolve from his concept of God and God's will. It is the task of the Board to satisfy itself that this is the case.

18. We turn then to the threefold test cited earlier, which the Board is called upon to apply to the applicant's beliefs; namely:

- (a) are they sincerely held;
- (b) are they religious; and
- (c) are they the cause of the objection to paying union dues?

In doing so, it must be recognized that the Board, in the final analysis, is required to make a judgment, based on its assessment of all of the evidence, including the applicant's own demeanour and general credibility in explaining his views, as to whether the applicant has met the test. Given the nature of the subject matter, the limits on the Board's expertise in this area, and the tendency, already noted, of "religious" and "non-religious" concepts to intertwine, that judgment can be a most perplexing one.

19. The Board has, in the present case, no doubt that Dr. Butler is a man of deep conviction. Further, large portions of the views he set out are unquestionably "religious" in

nature, relating as they do to the manner in which he perceives it is his duty to serve God. It does not follow, however, that all of his views on all subjects are necessarily "religious" in source. Dr. Butler is no longer a member of the Seventh Day Adventist Church, preferring, as he stated, to develop his own system of precepts and beliefs. It might be noted, however, that even the teachings of the Seventh Day Adventist Church, as the applicant concedes, do not go so far to proscribe membership in or support for a trade union. It is only the source of Dr. Butler's views insofar as they relate to joining or supporting the respondent that are at issue here. Dr. Butler unquestionably has developed sincere and thoughtful reasons for his opposition to the respondent trade union, with particular emphasis on the context of the university setting in which he has worked. But are these reasons "religious"?

20. The Board finds that they are not. While Dr. Butler's own religious convictions might well support a resolve on Dr. Butler's part to avoid placing himself in a potentially compromising situation by joining a trade union, or any other form of majoritarian organization, and participating in its activities, the Board finds Dr. Butler's opposition to the respondent, beyond that, to be motivated by essentially social and secular concerns, not unlike those of the authors of the 1978 petition, or indeed of the 277 individuals who signed the petition. While an individual need not label his views as "religious" in order for them to be so (cf. *Robert S. Zwicker*, [1980] OLRB Rep. Oct. 1514), it is not entirely without significance that Dr. Butler at no time in his statements about the respondent trade union, including a number of direct and amicable discussions with the respondent's President, related his various grounds of opposition to his religion, or concept of God, prior to his letter of April 29, 1981. In that letter announcing his intention to apply to the Board for exemption, Dr. Butler referred for the first time to "religious conviction", because, as Dr. Butler rightly observed in his evidence, "he had to". Nor is it entirely without significance that the applicant himself, when called upon in 1976 to characterize his grounds for exemption under the collective agreement, with the words "religious belief" and "personal conviction" explicitly before him, chose to mention only "personal conviction". Weighing all of the evidence, the Board finds itself arriving at a conclusion not unlike that reached by the Board in the *University of Windsor* case, [1979] OLRB Rep. May 458, where the Board stated at paragraph 9:

There is no doubt that the applicant's beliefs are religious, a conclusion with which the trade union respondent agrees. The Board, however, having assessed the evidence and the demeanor of the witnesses, finds that the applicant has failed to establish that his objection to trade unions is motivated by his religious beliefs. Rather it appears to the Board to be a case where the applicant has rationalized his general objections to trade unions in terms of his religious beliefs.

21. Without suggesting any attempt at deceit on the part of Dr. Butler, the Board is not satisfied that it is Dr. Butler's "religious conviction or belief", within the meaning of section 39, which forms the basis of his objection to the contribution of dues under the respondent's collective agreement. Rather, the Board finds that Dr. Butler's objection to the amended dues clause stems from other grounds, neither improper nor unusual, but not within the exemption provided by the section.

22. The application must be dismissed.

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APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR BOARD DURING AUGUST 1981

BARGAINING AGENTS CERTIFIED DURING AUGUST

No Vote Conducted

0826-80-R: Canadian Union of Public Employees, (Applicant) v. The Corporation of the Township of Innisfil, (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent in the Township of Innisfil, Ontario, save and except parks and arena supervisors, persons above the rank of parks and arena supervisor, office, clerical and technical personnel, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period". (23 employees in unit). (*Having regard to the agreement of the parties*).

2436-80-R: Canadian Union of Public Employees, (Applicant) v. City of Toronto Non-Profit Housing Corporation, (Respondent).

Unit: "all employees of the respondent in the City of Toronto, save and except property manager and persons above the rank of property manager". (37 employees in unit).

2839-80-R: Office and Professional Employees International Union, (Applicant) v. Page Hersey Employees' (Welland) Credit Union Limited, (Respondent).

Unit: "all employees of the respondent in the City of Welland, save and except manager, persons above the rank of manager and persons regularly employed for not more than twenty-four hours per week". (5 employees in unit).

0038-81-R: Retail, Wholesale and Department Store Union, (Applicant) v. Silverwood Dairies, Division of Silverwood Industries Limited, (Respondent).

Unit: "all dependent contractors of the respondent working in or out of Ottawa, Ontario, save and except supervisors and persons above the rank of supervisor". (28 employees in unit). (*Having regard to the agreement of the parties*).

0371-81-R: Teamsters Local Union No. 879, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. Hamilton Automobile Club, (Respondent).

Unit: "all employees of the respondent in Hamilton, Ontario, save and except dispatchers, persons above the rank of dispatcher, office and sales staff, persons regularly employed for not more than 24 hours per week, students employed during the school vacation period and persons covered by a subsisting Board certificate or by subsisting collective agreements". (14 employees in unit).

0430-81-R: United Rubber, Cork, Linoleum and Plastic Workers of America, (Applicant) v. Custom Leather Products Limited, (Respondent), v. Group of Employees, (Objectors).

Unit: "all employees of the respondent employed at its plants in the cities of Kitchener and Waterloo, Ontario, save and except foremen (foreladies) persons above the rank of foreman and forelady, associate development manager, quality control department, office and sales staff, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period". (263 employees in unit). (*Having regard to the agreement of the parties*).

0432-81-R: Health, Office and Professional Employees, Local 1976 Chartered by the United Food & Commercial Workers International Union, C.L.C., A.F.L.-C.I.O., (Applicant) v. Brewers Nuring Home, (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of the respondent in the Township of South Marysburgh in the County of Prince Edward, save and except supervisors, persons above the rank of supervisor, graduate and registered nurses, and office and clerical staff". (22 employees in unit).

0452-81-R: Service Employees' Union, Local 478 A.F.L., C.I.O., C.L.C., (Applicant) v. The Empire Hotel Company of Timmins Limited, (Respondent).

Unit: "all employees of the respondent in North Bay, Ontario, save and except supervisors, persons above the rank of supervisor, office and sales staff, payroll clerks, accounting clerks, audit department staff, security staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period". (77 employees in unit). (*Having regard to the agreement of the parties.*)

0515-81-R: Service Employees International Union, Local 183 A.F. of L., C.I.O., C.L.C., (Applicant) v. Hallowell House Limited, (Respondent) v. Group of Employees, (Objectors).

Unit #1: "all employees of the respondent in the Township of Hallowell of the County of Prince Edward, save and except supervisors and persons above the rank of supervisor, graduate and registered nurses, physiotherapists, office and clerical staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period". (47 employees in unit). (*Having regard to the agreement of the parties.*)

Unit #2: (*See Applications for Certification Dismissed Subsequent to a Post-Hearing Vote.*)

0537-81-R: United Food and Commercial Workers International Union, Local 633, (Applicant) v. 4772860 Ontario Limited, (Respondent).

Unit: "all employees of the respondent at Sudbury, save and except foremen, persons above the rank of foreman, office and clerical staff and students employed during the school vacation period". (10 employees in unit).

0583-81-R: Canadian Union of Public Employees, (Applicant) v. The Corporation of the County of Lambton, (Respondent) v. Ontario Nurses' Association, (Intervener).

Unit: "all employees of the respondent in its North Lambton Rest Home in the Town of Forest, in the County of Lambton, save and except supervisors, persons above the rank of supervisor, persons regularly employed for not more than twenty-four hours per week, students employed during the school vacation period, and persons covered by subsisting collective agreements". (75 employees in unit).

0646-81-R: Printing Specialities and Paper Products Union Local 540, Subordinate to International Printing and Graphic Communications Union, (Applicant) v. The Spectator, A Division of Southam Inc., (Respondent).

Unit: "all regular part-time delivery drivers and helpers, and Saturday part-time delivery drivers and helpers, regularly employed for not more than twenty-four hours per week and students employed in the same classifications during the school vacation period" (225 employees in unit).

0708-81-R: Labourers' International Union of North America, Local 183, (Applicant) v. Canmar Const., (Respondent).

Unit: "all carpenters, carpenters' apprentices and construction labourers in the employ of the respondent in Metropolitan Toronto, The Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, excluding the industrial, commercial and institutional

sector, save and except non-working foreman and persons above the rank of non-working foreman". (3 employees in unit). (*Having regard to the agreement of the parties*).

0789-81-R: Labourers' International Union of North America, Local 183, (Applicant) v. Vale Carpentry, (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman". (3 employees in unit).

0797-81-R: Labourers' International Union of North America, Local 183, (Applicant) v. J. & C Carpentry, (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in Metropolitan Toronto, The Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman". (12 employees in unit). (*Having regard to the agreement of the parties*).

0798-81-R: Labourers' International Union of North America, Local 183, (Applicant) v. Pombal Carpenters, (Respondent).

Unit: "all carpenters, carpenters' apprentices and construction labourers in the employ of the respondent in Metropolitan Toronto, The Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman". (3 employees in unit). (*Having regard to the agreement of the parties*).

0799-81-R: Labourers' International Union of North America, Local 183, (Applicant) v. Vimar Carpentry, (Respondent).

Unit: "all carpenters, carpenters' apprentices and construction labourers in the employ of the respondent in Metropolitan Toronto, The Regional Municipality of York and the County of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman". (3 employees in unit). (*Having regard to the agreement of the parties*).

0800-81-R: Faultless Doerner Employee's Association, (Applicant) v. Faultless-Doerner Manufacturing Inc., (Respondent).

Unit: "all employees of the respondent in Stratford, Ontario, save and except supervisors and those above the rank of supervisor, office, clerical and sales staff, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period". (30 employees in unit). (*Having regard to the agreement of the parties*).

0803-81-R: Hotels, Clubs, Restaurants and Tavern Employees' Union, Local 261, (Applicant) v. Casa Leone Ltd., (Respondent).

Unit: "all employees of the respondent at Ottawa, Ontario, save and except general manager and office staff". (10 employees in Unit). (*Having regard to the agreement of the parties*).

0807-81-R: Labourers' International Union of North America, Local 183, (Applicant) v. C. T. Rotundo Carpentry & General Contractors, (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman". (11 employees in unit).

0811-81-R: Graphic Arts International Union, Local 28-B, (Applicant) v. The Bryant Press Limited, (Respondent).

Unit: "all employees of the respondent in Metropolitan Toronto save and except foremen and foreladies, persons above the rank of foreman and forelady, office and sales staff, stationary and maintenance engineers, employees in the composing and letterpress departments, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period". (15 employees in unit). (*Having regard to the agreement of the parties*).

0812-81-R: International Beverage Dispensers' and Bartenders' Union, Local 280 of the Hotel and Restaurant Employees and Bartenders' International Union, AFL-CIO-CLC, (Applicant) v. Stage 212 Inc., (Respondent) v. Group of Employees, (Objectors).

Unit: "all full-time and part-time male and female bartenders, tapmen, waiters, bay boys, improvers, Beerex operators, and any other category related to the serving of alcoholic beverages, in the employment of the respondent, at Stage 212 Hotel, located in Toronto at 212 Dundas Street East". (12 employees in unit). (*Having regard to the agreement of the parties*).

0822-81-R: Retail, Commercial and Industrial Union Local 206 Chartered by the United Food & Commercial Workers International Union, C.L.C., A.F.L.-C.I.O., (Applicant) v. Fabricland Distributors Limited, (Respondent)

Unit: "all employees of the respondent employed at Guelph, Ontario regularly employed for not more than twenty-four hours per week and students employed during the school vacation period, save and except store manager and persons above the rank of store manager". (5 employees in unit). (*Having regard to the agreement of the parties*).

0826-81-R: Labourers' International Union of North America, Local 183, (Applicant) v. Kin-Lock Carpentry Ltd., (Respondent).

Unit: "all carpenters, carpenters' apprentices and construction labourers in the employ of the respondent in Metropolitan Toronto, The Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman". (10 employees in unit). (*Having regard to the agreement of the parties*).

0830-81-R: Labourers' International Union of North America, Local 183, (Applicant) v. Dufferin Carpentry Company, (Respondent)

Unit: "all carpenters, carpenters' apprentice and construction labourers in the employ of the respondent in Metropolitan Toronto, The Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman". (6 employees in unit). (*Having regard to the agreement of the parties*).

0832-81-R: London and District Service Workers' Union, Local 220, S.E.I.U., A.F.L., C.I.O., C.L.C., (Applicant) v. Komoka Nursing Home Limited, (Respondent).

Unit: "all employees of the respondent at Komoka, Ontario, regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except foremen and supervisors, persons above the rank of foreman and supervisor, professional nursing staff and office staff". (45 employees in unit). (*Having regard to the agreement of the parties*).

0837-81-R: Retail Clerks Union, Local 1977, Chartered by the United Food and Commercial Workers International Union, C.L.C., A.F.L., C.I.O., (Applicant) v. Zehrs Markets, A Division of Zehrmart Limited, (Respondent).

Unit: "all employees of the respondent in its retail stores at Fergus, Ontario, save and except store manager and persons above the rank of store manager". (41 employees in unit).

0841-81-R: Labourers' International Union of North America — Local 1036, (Applicant) v. The Municipality of Plummer Additional, (Respondent).

Unit: "all employees of the respondent save and except foremen, persons above the rank of foreman and office staff". (4 employees in unit). (*Having regard to the agreement of the parties*).

0843-81-R: Labourers' International Union of North America, Local 183, (Applicant) v. Mississauga Associated Contractors Inc., (Respondent).

Unit: "all construction labourers, carpenters and carpenters apprentices in the employ of the respondent in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman". (7 employees in unit).

0844-81-R: Commercial Workers Union Local 486, (Applicant) v. Fabricland Distributors, (Respondent).

Unit: "all employees of the respondent at Kingston, Ontario, save and except store manager, persons above the rank of store manager and persons regularly employed for not more than 24 hours per week and students employed during the school vacation period". (4 employees in unit). (*Having regard to the agreement of the parties*).

0849-81-R: Retail, Commercial and Industrial Union Local 206 Chartered by the United Food & Commercial Workers International Union, C.L.C., A.F.L. - C.I.O., (Applicant) v. Fabricland Distributors Western Co. Ltd., (Respondent).

Unit: "all employees of the respondent at Kitchener, Ontario, save and except store manager, persons above the rank of store manager, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period. (3 employees in unit). (*Having regard to the agreement of the parties*).

0850-81-R: Retail, Commercial and Industrial Union Local 206 Chartered by the United Food & Commercial Workers International Union, C.L.C., A.F.L.-C.I.O., (Applicant) v. Fabricland Distributors Western Co., (Respondent).

Unit: "all employees of the respondent at Kitchener, Ontario regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except store manager and persons above the rank of store manager". (3 employees in unit). (*Having regard to the agreement of the parties*).

0854-81-R: United Brotherhood of Carpenters and Joiners of AMerica — Local 1190, (Applicant) v. Findlay Carpentry, (Respondent).

Unit: “all carpenters and carpenters’ apprentices in the employ of the respondent in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman”. (10 employees in unit).

0856-81-R: Labourers’ International Union of North America, Local 183, (Applicant) v. Lebovic Enterprises and/or Westhill Homes and/or Westhill Redevelopment, (Respondents).

Unit: “all construction labourers in the employ of the respondents in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all construction labourers in the employ of the respondents in all other sectors in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Hlaton and the Township of Pickering in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman”. (2 employees in unit).

0857-81-R: Labourers’ International Union of North America, Local 183, (Applicant) v. Apex Services Division of 226023 Holdings Limited, (Respondent).

Unit: “all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all construction labourers in the employ of the respondent in all other sectors in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Onatrio, save and except non-working foremen and persons above the rank of non-working foreman”. (13 employees in unit).

0858-81-R: United Brotherhood of Carpenters and Joiners of America, Local 1669, (Applicant) v. Edison Contracting Ltd., (Respondent).

Unit: “all carpenters and carpenters’ apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all carpenters and carpenters’ apprentices in the employ of the respondent in all other sectors in the District of Kenora, including the Patricia portion, save and except non-working foremen and persons above the rank of non-working foreman”. (3 employees in unit).

0865-81-R: Canadian Union of Public Employees, (Applicant) v. Brockville General Hospital, (Respondent).

Unit: “all employees of the respondent in Brockville, save and except Ward Clerks, Department Heads, Graduate Dietitians, Graduate Nursing Staff, Graduate Pharmacists, Technical Personnel, Chief Engineer, Office Staff, Professional Staff, Student Dietitians, Undergraduate Nursing Staff, Undergraduate Pharmacists, Supervisors, Persons above the rank of Supervisors, those regularly employed for not more than 24 hours per week, students employed during the school vacation period and employees covered by existing agreements”. (73 employees in unit). (*Having regard to the agreement of the parties*).

0866-81-R: United Brotherhood of Carpenters and Joiners of America Local 1190, (Applicant) v. Structural and Finish Carpentry, (Respondent).

Unit: “all carpenters and carpenters’ apprentices in the employ of the respondent in Metropolitan Toronto, The Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons aboved the rank of non-working foreman”. (6 employees in unit).

0867-81-R: United Brotherhood of Carpenters and Joiners of America Local 1190, (Applicant) v. La Salle Construction (A division of 354-274 Ontario Ltd.), (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman". (9 employees in unit).

0868-81-R: United Brotherhood of Carpenters and Joiners of America Local 1190, (Applicant) v. Fernway Construction Corporation, (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in Metropolitan Toronto, The Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman". (14 employees in unit).

0873-81-R: International Brotherhood of Painters and Allied Trades — Local Union 1891, (Applicant) v. Ramada Painting & Decorating Ltd. (Formerly Italia Painting Ltd.), (Respondent).

Unit: "all painters and painters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all painters and painters' apprentices in the employ of the respondent in all other sectors in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman". (16 employees in unit).

0878-81-R: United Brotherhood of Carpenters and Joiners of America Local 1190, (Applicant) v. Omar Carpenters, (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in Metropolitan Toronto, The Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman". (6 employees in unit).

0886-81-R: United Brotherhood of Carpenters and Joiners of America Local 1190, (Applicant) v. Andrea Kaminski Carpenters, (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in Metropolitan Toronto, The Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman". (5 employees in unit).

0887-81-R: United Brotherhood of Carpenters and Joiners of America Local 1190, (Applicant) v. Chathedral Carpentry, (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in Metropolitan Toronto, The Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman". (2 employees in unit).

0888-81-R: United Brotherhood of Carpenters and Joiners of America — Local 1190, (Applicant) v. Karl Thier Construction Ltd., (Respondent).

Unit: “all carpenters and carpenters’ apprentices in the employ of the respondent in Metropolitan Toronto, The Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman”. (10 employees in unit).

0894-81-R: Commercial Workers Union Local 486, (Applicant) v. Blackburn Hamlet IGA, (Respondent).

Unit: “all employees of the respondent at Gloucester, Ontario, save and except store manager and persons above the rank of store manager”. (35 employees in unit). (*Having regard to the agreement of the parties*).

0895-81-R: International Union of Operating Engineers, Local 793, (Applicant) v. R. M. Elliott Construction Ltd., (Respondent).

Unit: “all employees of the respondent in the industrial commercial and institutional sector of the construction industry in the Province of Ontario and all employees of the respondent in all other sectors in that portion of the District of Algoma south of the 49th parallel of latitude, engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman”. (4 employees in unit).

0898-81-R: United Brotherhood of Carpenters and Joiners of America Local 1190, (Applicant) v. DeBartolo Carpentry and Building Co. Limited, (Respondent).

Unit: “all carpenters and carpenters’ apprentices in the employ of the respondent in Metropolitan Toronto, The Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman”. (4 employees in unit).

0904-81-R: The Carpenters’ District Council of Toronto and Vicinity on behalf Local, 27, 666, 681, 1133, 1747, 1963, 1304, 3227, and 3233, United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Inkan Ltd., (Respondent).

Unit: “all carpenters and carpenters’ apprentices in the employ of the respondent in the industrial commercial and institutional sector of the construction industry in the Province of Ontario and all carpenters and carpenters’ apprentices in the employ of the respondent in all other sectors in Metropolitan Toronto, The Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman”. (2 employees in unit).

0805-81-R: Labourers’ International Union of North America Ontario Provincial District Council, (Applicant) v. Alnor Earthmoving Limited, (Respondent).

Unit: “all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all construction labourers in the employ of the respondent in all other sectors in that portion of the District of Algoma south of the 49th parallel of latitude, save and except non-working foremen and persons above the rank of non-working foreman”. (2 employees in unit).

0906-81-R: Service Employees Union, Local 210, Affiliated with Service Employees International Union, AFL-CIO-CLC, (Applicant) v. Windsor Western Hospital Centre Inc. (Riverview Unit), (Respondent) v. Ontario Public Service Employees Union, (Intervener).

Unit: "all employees of the respondent in Windsor, regularly employed for not more than twenty (20) hours per week and students employed during the school vacation period, save and except professional medical staff, graduate nursing staff, under-graduate nurses, graduate dieticians, para-medical employees, supervisors, persons above the rank of supervisor, office staff and persons covered by subsisting collective agreements". (13 employees in unit). (*Having regard to the agreement of the parties*).

0907-81-R: United Brotherhood of Carpenters and Joiners of America Local 1190, (Applicant) v. Jamieson Carpentry, (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman". (10 employees in unit).

0908-81-R: United Brotherhood of Carpenters and Joiners of America Local 1190, (Applicant) v. All Weather Carpentry, (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman". (5 employees in unit).

0910-81-R: Labourers' International Union of North America, Local 183, (Applicant) v. Sirena Construction Company Ltd., (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman". (10 employees in unit).

0912-81-R: International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW, (Applicant) v. Mohawk Industries Division of McCarthy-Gallagher Limited, (Respondent).

Unit: "all employees of the respondent at Pickering, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff, students employed during the school vacation period and persons regularly employed for not more than twenty-four hours (24 hrs.) per week". (52 employees in unit). (*Having regard to the agreement of the parties*).

0918-81-R: United Brotherhood of Carpenters and Joiners of America Local 1190, (Applicant) v. Harry Dickison Construction, (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman". (8 employees in unit).

0921-81-R: Labourers' International Union of North America, Local 1089, (Applicant) v. M.H.G. International Ltd., (Respondent).

Unit: "all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all construction labourers in the employ of the respondent in all other sectors in the County of Lambton, save and except non-working foremen and persons above the rank of non-working foreman". (3 employees in unit).

0928-81-R: United Brotherhood of Carpenters of Joiners of America Local 1190, (Applicant) v. Eastwood Carpentry, (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in Metropolitan Toronto, The Regional Municipality of York and the County of Peel, the Township Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman". (3 employees in unit).

0934-81-R: United Brotherhood of Carpenters and Joiners of America Local 1190, (Applicant) v. Central Carpentry Limited, (Respondent).

Unit #1: "all carpenters and carpenters' apprentices in the employ of the respondent in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (6 employees in unit).

Unit: #2: "all carpenters and carpenters' apprentices in the employ of the respondent in the County of Ontario (except the Townships of Pickering, Rama and Mara) and the County of Durham (Except the Township of Hope), excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman". (7 employees in unit).

0937-81-R: United Brotherhood of Carpenters and Joiners of America Local 1190, (Applicant) v. Patz and Leo's Construction Limited, (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in the County of Ontario (except the Townships of Pickering, Rama and Mara) and the County of Durham (except the Township of Hope), excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman". (6 employees in unit).

0953-81-R: Ontario Public Service Employees Union, (Applicant) v. V. S. Services Ltd., (Respondent).

Unit #1: "all employees of the respondent at the Great War Memorial Hospital in Perth, Ontario save and except food service manager, supervisors, persons above the rank of supervisor, office and clerical staff, dietician, persons regularly, employed for not more than 24 hours per week and students employed during the school vacation period". (7 employees in unit). (*Having regard to the agreement of the parties*).

Unit #2: "all employees of the respondent at the Great War Memorial Hospital in Perth, Ontario, regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except food service manager, supervisors, persons above the rank of supervisor, office and clerical staff and dietician". (12 employees in unit). (*Having regard to the agreement of the parties*).

0954-81-R: United Brotherhood of Carpenters and Joiners of America Local 1190, (Applicant) v. United Carpenters, (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the

Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman". (7 employees in unit).

0955-81-R: United Brotherhood of Carpenters and Joiners of America Local 1190, (Applicant) v. Tradesmen Carpentry Limited, (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman". (25 employees in unit).

0956-81-R: United Brotherhood of Carpenters and Joiners of America Local 1190, (Applicant) v. Laskay Construction Ltd., (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working formen". (5 employees in unit).

0959-81-R: Labourers' International Union of North America, Local 506, (Applicant) v. D. & E. Construction, (Respondent).

Unit: "all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all construction labourers in the employ of the respondent in all other sectors in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman". (4 employees in unit).

0962-81-R: Labourers' International Union of North America, Local 183, (Applicant) v. Monte Carlo Carpentry, (Respondent).

Unit: "all carpenters, carpenters' apprentices and construction labourers in the employ of the respondent in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman". (6 employees in unit).

0967-81-R: United Steelworkers of America, (Applicant) v. Cedardale Scrap Iron & Metals Division of Lake Ontario Steel Company Limited, (Respondent).

Unit: "all employees of the respondent in Oshawa, Ontario, save and except foremen and persons above the rank of foreman, office and clerical staff, persons regularly employed for not more than 24 hours per week, and students employed during the school vacation period". (27 employees in unit). (*Having regard to the agreement of the parties*).

0969-81-R: United Brotherhood of Carpenters and Joiners of America Local 1190, (Applicant) v. R. Mordini and Sons Carpentry Limited, (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of

Ontario, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman". (21 employees in unit).

0970-81-R: United Brotherhood of Carpenters and Joiners of America Local 1190, (Applicant) v. Cosmopolitan Building Services, (Respondent).

Unit: "all carpentes and carpenters' apprentices in the employ of the respondent in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman". (3 employees in unit).

0971-81-R: United Brotherhood of Carpenters and Joiners of America Local 1190, (Applicant) v. Ramo Carpentry Company Limited, (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman". (50 employees in unit).

0972-81-R: United Brotherhood of Carpenters and Joiners of America Local 1190, (Applicant) v. E. and M. Carpentry, (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in Metropolitan Toronto, the Regional Municipality of York, and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman". (6 employees in unit).

0973-81-R: United Brotherhood of Carpenters and Joiners of America Local 1190, (Applicant) v. Angelo Martinella Carpentry, (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in Metropolitan Toronto, the Regional Municipality of York, and the County of Pell, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and in the County of Halton and the Township of Pickering in the County of Ontario, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman". (9 employees in unit).

0974-81-R: United Brotherhood of Carpenters and Joiners of America Local 1190, (Applicant) v. G. and L. Carpenters Limited, (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in Metropolitan Toronto, the Regional Municipality of York, and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working formen". (15 employees in unit).

0977-81-R: Ontario Public Service Employees Union, (Applicant) v. Almonte General Hospital, (Respondent).

Unit #1: "all employees of the respondent at Almonte, Ontario, save and except professional medical staff, registered, graduate and undergraduate nurses, paramedical employees, office and clerical employees, stationary employees, supervisors and persons above the rank of supervisor, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period". (16 employees in unit). (*Having regard to the agreement to the parties*).

Unit #2: "all employees of the respondent at Almonte, Ontario, regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except professional medical staff, registered, graduate and undergraduate nurses, paramedical employees, office and clerical employees, stationary engineers, supervisors and persons above the rank of supervisor". (27 employees in unit). (*Having regard to the agreement to the parties*).

0982-81-R: United Brotherhood of Carpenters and Joiners of America Local 1190, (Applicant) v. Stanrick General Carpentry Limited, (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman". (8 employees in unit).

0983-81-R: United Brotherhood of Carpenters and Joiners of America Local 1190, (Applicant) v. Canadian Carpentry Limited, (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Town of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman". (13 employees in unit).

0995-81-R: Teamsters Local Union No. 1000, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. Flavorite Poultry Limited, (Respondent).

Unit: "all office and clerical employees of the respondent at its plant in Hamilton, Ontario, save and except supervisors, persons above the rank of supervisor, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period". (3 employees in unit). (*Having regard to the agreement of the parties*).

1009-81-R: United Brotherhood of Carpenters and Joiners of America Local 1190, (Applicant) v. Chard Carpentry, (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman". (9 employees in unit).

1010-81-R: United Brotherhood of Carpenters and Joiners of America Local 1190, (Applicant) v. Bivongi Carpentry, (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman". (3 employees in unit).

1011-81-R: United Brotherhood of Carpenters and Joiners of America Local 1190, (Applicant) v. C. Aureli and Sons Carpenters, (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of

Ontario, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman". (6 employees in unit).

1015-81-R: United Brotherhood of Carpenters and Joiners of America Local 1190, (Applicant) v. Skara Carpenters Construction, (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman". (20 employees in unit).

1022-81-R: Labourers' International Union of North America, Local 183, (Applicant) v. Independent Carpenters, (Respondent).

Unit: "all carpenters, carpenters' apprentices and construction labourers in the employ of the respondent in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman". (3 employees in unit). (*Having regard to the agreement of the parties*).

1028-81-R: United Brotherhood of Carpenters and Joiners of America Local 1190, (Applicant) v. Socio Carpentry Contractor, (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in Metropolitan Toronto, The Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman". (4 employees in unit).

1029-81-R: United Brotherhood of Carpenters and Joiners of America Local 1190, (Applicant) v. M. and B. Carpenters Limited, (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in Metropolitan Toronto, The Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman". (22 employees in unit).

1030-81-R: United Brotherhood of Carpenters and Joiners of America Local 1190, (Applicant) v. Desmark Developments Inc., (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman". (14 employees in unit).

1032-81-R: United Brotherhood of Carpenters and Joiners of America Local 1190, (Applicant) v. Rexdale Carpentry Limited, (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman". (5 employees in unit).

1045-81-R: United Brotherhood of Carpenters and Joiners of America Local 1190, (Applicant) v. La Neve Contractor Company, (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman". (3 employees in unit).

1046-81-R: United Brotherhood of Carpenters and Joiners of America Local 1190, (Applicant) v. A. & V. Carpentry, (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in Metropolitan Toronto, The Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Ontario, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman". (3 employees in unit).

1048-81-R: United Brotherhood of Carpenters and Joiners of America Local 1190, (Applicant) v. C. and F. Gatto Carpentry Contractors Limited, (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman". (11 employees in unit).

1049-81-R: United Brotherhood of Carpenters and Joiners of America Local 1190, (Applicant) v. Tri-Lake, (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in the County of Ontario (except the Townships of Pickering, Rama and Mara) and the County of Durham (except the Township of Hope), excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman". (4 employees in unit).

1059-81-R: Labourers' International Union of North America, Local 183, (Applicant) v. Bloom-Field Construction Company Ltd., (Respondent).

Unit: "all carpenters, carpenters' apprentices and construction labourers in the employ of the respondent in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Townships of Pickering in the County of Ontario, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman". (3 employees in unit).

Bargaining Agents Certified Subsequent to a Pre-Hearing Vote

0374-81-R: United Brotherhood of Carpenters and Joiners of America, Local Union No. 2679, (Applicant) v. Ontario Store Fixtures Inc., (Respondent) v. United Steelworkers of America, (Intervener).

Unit: "all employees of the respondent in its Wood Division in the Municipality of Metropolitan Toronto, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period". (249 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on list as originally prepared by employer	252
Number of persons who cast ballots	198
Number of ballots excluding segregated ballots cast by persons whose names appear on voters' list	197
Number of segregated ballots cast by persons whose name appear on voters' list	1

0450-81-R: Canadian Union of Operating Engineers and General Workers, (Applicant) v. The Board of Governors of The Riverdale Hospital, (Respondent) v. The Toronto Civic Employees, Local 43 of the Canadian Union of Public Employees, (Intervener).

Unit: "all maintenance employees of the respondent save and except foremen, persons above the rank of foreman, nursing, administrative, office and clerical employees, security guards, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period and employees falling within the scope of collective agreements between the Hospital and the Canadian Union of Public Employees, Local 79 and the Canadian Union of Operating Engineers and General Workers Local 101". (15 employees in unit). (*Having regard to the agreement of the parties*).

0765-81-R: Canadian Paperworkers Union, (Applicant) v. E. B. Eddy Forest Products Limited Wood Products Division, Lumber and Sawmill Workers' Union, Local 2693 of The United Brotherhood of Carpenters and Joiners of America, (Intervener).

Unit: "all employees of the respondent at Nairn Centre, Ontario, save and except foremen, persons above the rank of foreman, scalers, office staff, security personnel and employees covered by subsisting collective agreement". (220 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters' list	226
Number of persons who cast ballots	202
Number of ballots marked in favour of the applicant	182
Number of ballots marked in favour of the intervener	20

Bargaining Agents Certified Subsequent to a Post-Hearing Vote

0212-81-R: Retail, Wholesale and Department Store Union, AFL:CIO:CLC., (Applicant) v. A. J. Bus Lines Ltd., (Respondent) v. Group of Employees, (Objectors).

Unit #2: "all employees of the respondent at Elliot Lake regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period, save and except foremen, persons above the rank of foreman, and office and sales staff". (29 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on list as originally prepared by employer	31
Number of persons who cast ballots	25
Number of ballots marked in favour of applicant	13
Number of ballot marked against applicant	11
Ballots segregated and not counted	1

Unit #1: (*See Applications for Certification Dismissed — Post Hearing Vote*).

0322-81-R: United Steelworkers of America, (Applicant) v. Rim Trim Inc., (respondent) v. Group of Employees (Objector).

Unit: "all employees of the respondent company in Metropolitan Toronto, save and except foremen, persons above the rank of foreman, office and sales staff". (62 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on list as originally prepared by employer		64
Number of persons who cast ballots	58	
Number of ballots marked in favour of applicant	31	
Number of ballots marked against applicant	23	
Ballots segregated and not counted	4	

0631-81-R: Retail, Wholesale and Department Store Union AFL:CIO:CLC, (Applicant) v. Caswell Hotel (Sault) Limited, (Respondent) v. Group of Employees, (Objectors).

Unit: "all office and clerical employees of the respondent at Sault Ste. Marie, save and except assistant managers and persons above the rank of assistant manager, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period". (11 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters' list		10
Number of persons who cast ballots	10	
Number of ballots marked in favour of applicant	6	
Number of ballots marked against applicant	4	

APPLICATIONS FOR CERTIFICATION DISMISSED

No Vote Conducted

2186-79-R: United Cement, Lime & Gypsum Workers International Union, (Applicant) v. Rumble Contracting Ltd., (Respondent).

2215-79-R: Ready Mix Building Supply, Hydro and Construction Drivers, Local 230 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. Rumble Contracting Ltd., (Respondent) v. United Cement, Lime & Gypsum Workers International Union, (Intervener).

0439-80-R: United Cement Lime Gypseum Workers International Union, (Applicant) v. Acton Shoring and Excavating Ltd., (Respondent) v. Teamsters Local Union Number 230, Ready Mix, Building Supply, Hydro and Construction Drivers, Warehousemen and Helpers of the International Brotherhood of Teamsters, Chaufferus, Warehousemen and Helpers of America, (Intervener).

0752-80-R: Canadian Labour Congress, Chartered Local Union No. 1689 (Canadian Association of Burlesque Entertainers), (Applicant) v. Algonquin Tavern, (Respondent).

0827-80-R: Canadian Labour Congress, Chartered Local Union No. 1689 (Canadian Association of Burlesque Entertainers), (Applicant) v. Waverley Hotel Ltd., (Respondent).

0878-80-R: Canadian Labour Congress, Chartered Local Union No. 1689 (Canadian Association of Burlesque Entertainers), (Applicant) v. Carousel Inn (Oshawa) Limited, (Respondent).

1048-80-R: Canadian Labour Congress, Directly Chartered Local 1689, Canadian Association of Burlesque Entertainers, (Applicant) v. Colonial Tavern Limited, (Respondent).

0043-81-R: Labourers' International Union of North America, Local 183, (Applicant) v. Karvon Construction Limited, (Respondent).

0714-81-R: Labourers' International Union of North America, Local 183, (Applicant) v. Montevideo Court Apartments Ltd., and/or Doa Vista Court Apartments Ltd., and/or Donway East Courts Ltd., and/or Boyaca Court Ltd., (Respondent) v. Group of Employees, (Objectors).

0773-81-R: Canadian Union of Public Employees, (Applicant) v. The Corporation of the Hamilton Public Library Board, (Respondent).

0790-81-R: Labourers' International Union of North America, Local 183, (Applicant) v. Beaver Carpentry, (Respondent) v. United Brotherhood of Carpenters and Joiners of America, Local Union 1190, (Intervener).

Applications for Certification Dismissed Subsequent to a Pre-Hearing Vote

0249-81-R: International Woodworkers of America, (Applicant) v. Electrical Contacts Limited (Respondent).

Unit: "all employees of the respondent employed in the Town of Hanover, Ontario save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than 24 hours per week, students employed through a co-operative training program with a high school, community college, university or similar institution of learning provided that the duration of their stay does not exceed three consecutive months". (47 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on list as originally prepared by employer		45
Number of persons who cast ballots		46
Number of ballots excluding segregated ballots cast by persons whose names appear on voters' list	41	
Number of segregated ballots cast by persons whose name appear on voters' list	4	
Number of segregated ballots cast by persons whose names do not appear on voters' list	1	

0670-81-R: Teamsters Union Local 938, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. Titan Cartage Limited, (Respondent) v. Titan Cartage Employees Association, (Intervener).

Unit: "all employees of the respondent in Metropolitan Toronto, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than twenty-four hours per week, and students employed during the school vacation period". (53 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on list as originally prepared by employer		55
Number of persons who cast ballots		48
Number of ballots marked in favour of applicant	11	
Number of ballots marked in favour of intervener	37	

Applications for Certification Dismissed Subsequent to a Post-Hearing Vote

0212-81-R: Retail, Wholesale and Department Store Union, AFL:CIO:CLC:, (Applicant) v. A. J. Bus Lines Ltd., (Respondent) v. Group of Employees (Objectors).

Unit: #1: "all employees of the respondent at Elliot Lake, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period". (7 employees in unit). (*Having regard to the agreement of the parties*).

Unit #2: (*See Bargaining Agents Certified — Post Hearing Vote*).

0515-81-R: Service Employees International Union, Local 183 A. F. OFL., C.I.O., C.L.C., (Applicant) v. Hallowell House Limited, (Respondent) v. Group of Employees, (Objectors).

Unit #2: "all employees of the respondent regularly employed for not more than 24 hours per week and students employed during the school vacation period in the Township of Hallowell of the County of Prince Edward, save and except supervisors and persons above the rank of supervisor, registered and graduate nurses, physiotherapists and office and clerical staff". (47 employees in unit). (*Having regard to the agreement of the parties*).

Number of persons on voters' list at start of vote		24
Number of persons who cast ballots	23	
Number of ballots marked in favour of applicant	9	
Number of ballots marked against applicant	12	
Ballots segregated and not counted	2	

Unit #1: (*See Bargaining Agents Certified — No Vote Conducted*).

0636-81-R: Retail, Wholesale and Department Store Union AFL:CIO:CLC, (Applicant) v. William's Beef Parlor Inc., (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent at Sarnia, Ontario, save and except supervisors, persons above the rank of supervisor and office staff". (56 employees in unit).

Number of names of persons on revised voters' list		55
Number of persons who cast ballots	49	
Number of spoiled ballots	1	
Number of ballots marked in favour of applicant	4	
Number of ballots marked against applicant	44	

0694-81-R: Laundry and Linen Drivers and Industrial Workers Teamsters Local Union 847, (Applicant) v. Metropolitan Wiere (Canada) Ltd., (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent in Metropolitan Toronto save and except foremen, persons above the rank of foreman, office and sales staff, persons employed for not more than twenty-four hours per week and students employed during the school vacation period". (41 employees in unit).

APPLICATIONS FOR CERTIFICATION WITHDRAWN

0669-81-R: United Brotherhood of Carpenters and Joiners of America, Local 1946, (Applicant) v. Att — Inc Phoenix Homes, Actpar Insulations, Actpar Construction Limited, (Respondent).

0699-81-R: United Steelworkers of America, (Applicant) v. Ivaco Inc., Lundy Steel Division, (Respondent).

0770-81-R: Canadian Paperworkers Union, (Applicant) v. Coles Publishing Company Ltd., (Respondent) v. International Union of Allied, Novelty and Production Workers, Local 905 (formerly known as International Union of Doll & Toy Workers of the United States & Canada, Local 905), (Intervener).

0871-81-R: Service Employees International Union, Local 663 A. F. OFL., C.I.O., C.L.C., (Applicant) v. Hallowell House Limited, (Respondent) v. Group of Employees, (Objectors).

0897-81-R: United Brotherhood of Carpenters and Joiners of America Local 1190, (Applicant) v. Centennial Carpentry, (Respondent).

0926-81-R: International Brotherhood of Painters and Allied Trades Local 1003, (Applicant) v. Atlantic Painting Reg'd, (Respondent).

0927-81-R: The Millwright District Council of Ontario, United Brotherhood of Carpenters and Joiners of America, on behalf of Local 1244; 1007; 1410; 1425; 1592; 1669; 1916 and 2309, (Applicant) v. Stork Pumps Div. Stork Werkspoor Can. Ltd., (Respondent).

0925-81-R: United Brotherhood of Carpenters and Joiners of America Local 1190, (Applicant) v. Arrow Carpentry Scarborough Limited, (Respondent).

0938-81-R: United Brotherhood of Carpenters and Joiners of America Local 1190, (Applicant) v. C.O.B. National Carpentry, 438951 Ont. Limited, (Respondent).

0939-81-R: United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 853, (Applicant) v. 368698 Ontario Incorporated, carrying on business under the firm name and style as London Sprinkler Co., (Respondent).

0940-81-R: United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 853, (Applicant) v. 368698 Ontario Incorporated, carrying on business under the firm name and style as London Sprinkler Co., (Respondent).

0979-81-R: Labourers' International Union of North America, Local 1089, (Applicant) v. Inco Sarnia Limited, (Respondent).

0984-81-R: United Brotherhood of Carpenters and Joiners of America Local 1190, (Applicant) v. Holiday Carpentry, (Respondent).

1007-81-R: Retail, Wholesale and Department Store, AFL:CIO:CLC:, (Applicant) v. Anco Food Products Ltd., (Respondent).

1012-81-R: United Brotherhood of Carpenters and Joiners of America Local 1190, (Applicant) v. Karl Thier Construction Limited, (Respondent).

1020-81-R: Ontario Nurses' Association, (Applicant) v. Windsor Western Hospital Centre, (Respondent).

1034-81-R: United Brotherhood of Carpenters and Joiners of America Local 1190, (Applicant) v. Joseph Schmidt Carpentry Limited, (Respondent).

APPLICATIONS FOR DECLARATION OF RELATED EMPLOYER

0552-80-R: Carpenters' District Council of Toronto and Vicinity on behalf of Locals 26, 666, 1133, 1747, 1963, 1304, 3227 and 3233, United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Valentine Enterprises Contracting Limited and Trans-Nation Incorporated, (Respondent). (*Dismissed*).

0673-81-R: Ontario Taxi Association, 1688, C.L.C., (Applicant) v. United Dispatch, Stuart Caverhill, Doreen Patrick, Windsor Airline Limousine Services Limited, (carrying on business as Veteran Cab Company), and William Oag, (Respondent). (*Granted*).

0792-81-R: The Carpenters' District Council of Toronto and Vicinity, United Brotherhood of Carpenters and Joiners of America, on behalf of Local Union 1190, (Applicant) v. Cancian Brothers Limited and Cancian Construction Company Limited, (Respondents) v. Labourers' International Union of North America, Local 183, (Intervener). (*Withdrawn*).

0914-81-R: Labourers's International Union of North America, Local 183, (Applicant) v. Ideal Greenpark Homes and Greenpark Homes and Athene Holdings Limited and Ideal Homes and Kart Construction Limited, (Respondents). (*Withdrawn*).

APPLICATIONS FOR DECLARATION TERMINATING BARGAINING RIGHTS

1940-80-R: Arthur Wilkinson, (Applicant) v. United Food & Commercial Workers International Union Local 633 AFL-CIO-CLC, (Respondent) v. Vaunclair Meats Limited, (Intervener). (*Dismissed*).

0238-81-R: Joseph Brant Memorial Hospital, (Applicant) v. International Union of Operating Engineers, Local 772, (Respondent) v. Canadian Union of Public Employees, Local 1065, (Intervener). (*Dismissed*).

0250-81-R: Allan Crowder, (Applicant) v. United Food and Commercial Workers International Union Region 18, Local 617P, A.F.L., C.I.O., C.L.C., (Respondent) v. Hostess Food Products Limited, (Intervener).

Unit: "all employees of Hostess Food Products Limited at Hamilton, save and except supervisors, persons above the rank of supervisor and students employed during the school vacation period, and persons regularly employed for not more than twenty-four (24) hours per week". (22 employees in unit). (*Granted*).

Number of names of persons on revised voters' list		21
Number of persons who cast ballots		20
Number of ballots marked in favour of trade union	9	
Number of ballots marked against trade union	11	

0300-81-R: Thomas Pearson, (Applicant) v. Christian Labour Association of Canada, (Respondent) v. Epworth Glass Limited known as Upper Canada Glass, (Intervener). (*Dismissed*).

0402-81-R: Mohawk Construction Limited, (Applicant) v. International Union of Operating Engineers, Local 793, (Respondent). (*Dismissed*).

0793-81-R: P. J. Wallbank Mfg. Company Ltd., (Applicant) v. International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, (U.A.W.), (Respondent). (*Granted*).

APPLICATIONS FOR DECLARATION OF UNLAWFUL STRIKE

1037-81-U: Charles R. Viscombe Limited, (Applicant) v. Sheet Metal Workers International Association, Local union 504, Gary Roach and Bob Armstrong et al., (Respondents) (*Withdrawn*).

COMPLAINTS OF UNFAIR LABOUR PRACTICE

1894-77-U: Peter Irish, on behalf of himself, and all other members of Local 2222 of the United Brotherhood of Carpenters and Joiners of America who reside outside of the geographic area of the said local, (Complainants) v. Local 2222 of the United Brotherhood of Carpenters and Joiners of America, (Respondent) v. The Electrical Power Systems Construction Association, (Intervener #1) v. Ontario Allied Construction Trades Council, (Intervener #2). (*Terminated*).

2463-80-U: Michael Kenneth Muir, (Complainant) v. Canadian Union of Public Employees Local 43, (Respondent). (*Withdrawn*).

2710-80-U: Marcel Fortin, (Complainant) v. B G Cheeco (Bedard Gerard Ontario), (Respondent). (*Dismissed*).

2817-80-U: Donna Waslyk, (Complainant) v. Milk and Bread Drivers, Dairy Employees, Caterers and Allied Employees Local Union No. 647, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Respondent). (*Dismissed*).

2818-80-U: William Shaw, (Complainant) v. Milk and Bread Drivers, Dairy Employees, Caterers and Allied Employees Local Union No. 647, affiliated with the International Brotherhood of Teamsters Chauffeurs, Warehousemen and Helpers of America, (Respondent). (*Dismissed*).

0013-81-U: Ontario Public Service Employees Union, (Complainant) v. Alpha Laboratories Inc., (Respondent). (*Granted*).

0061-81-U: Nicolas Finney, (Complainant) v. United Electrical, Radio and Machine Workers of America (UE), (Respondent) v. RCA Limited, (Intervener). (*Dismissed*).

0115-81-U: United Cement, Lime & Gypsum Workers International Union, (Complainant) v. American Construction Company, (Respondent). (*Withdrawn*).

0198-81-U: Linda Holmes, (Complainant) v. Ontario Hospital Association (Blue Cross), (Respondent). (*Granted*).

0204-81-U: American Construction Co., A Division of Haldi Investments Ltd., (Complainant) v. Teamsters Union, Local 230, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of American and Gerald T. Wilkes, Respondents). (*Withdrawn*).

0294-81-U: Ontarion Taxi Association 1688 C.L.C., (Complainant) v. United Dispatch, Stuart Caverhill and Doreen Patrick, (Respondents). (*Granted*).

0316-81-U: International Woodworkers of America, (Applicant) v. Electrical Contacts Limited, (Respondent). (*Dismissed*).

0379-81-U: Isobel Northover, Linda Tower, et al, (Complainants) v. American Federation of Grain Millers, Local 242, and INter-Bake Foods Ltd., (Respondents). (*Dismissed*).

0624-81-U: United Steelworkers of America, (Complainant) v. Euroclean Canada Inc. (formerly Onward Manufacturing Ltd.), (Respondent). (*Terminated*).

0632-81-U: Norman Walker, (Complainant) v. United Automobile, Aerospace, Agricultural Implement Workers of America (UAW), Local 439, (Respondent) v. Massey-Ferguson Industries Limited, (Intervener). (*Dismissed*).

0652-81-U: Leopold Jean, (Complainant) v. Canadian Union of Public Employees, (C.U.P.E.), (Respondent) v. Corporation of the City of Sarnia, (Intervener). (*Dismissed*).

0737-81-U: Canadian Union of Public Employees, (Complainant) v. Sunnycrest Nursing Homes Limited, (Respondent). (*Withdrawn*).

0739-81-U: Jean Marie Simangan, (Complainant) v. Local 204, Service Employees Union and The Wellesley Hospital, (Respondent). (*Withdrawn*).

0775-81-U: United Brotherhood of Carpenters and Joiners of America, Local Union 1946, (Complainant) v. Att-Incorp. Phoenix Homes; Actpar Insulation; Actpar Construction Limited, (Respondents). (*Withdrawn*).

0781-81-U: Betty Lavoie, (Complainant) v. Office and Professional Employees International Union, Local 343, (Respondent) v. International Association of Bridge, Structural and Ornamental Ironworkers, Local 700, (Intervener). (*Dismissed*).

0783-81-U: Dennis Richardson, (Complainant) v. United Food and Commercial Workers International Union and its Local 417, Donald Dayman, Julian Hoebienk and Gary Haycock, (Respondents). (*Withdrawn*).

0827-81-U: Ronald Williams (Complainant) v. United Brotherhood of Carpenters and Joiners of America, (Respondent). (*Withdrawn*).

0845-81-U: Ready-Mix, Building Supply, Hydro & Construction Drivers, Warehousemen and Helpers Local 230, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Complainant) v. Fowler Construction Co. Limited, (Respondent). (*Withdrawn*).

0855-81-U: Service Employees Union, Local 478, (Complainant) v. Parry Sound District General Hospital, (Respondent). (*Withdrawn*).

0893-81-U: Mrs. Maria D. A. Medeiros, (Complainant) v. United Food and Commercial Workers Int. Union Local 1105P, (Respondent). (*Withdrawn*).

0913-81-U: International Beverage Dispensers and Bartenders Union, Local 280, (Complainant) v. Cloverleaf Hotel, Division of M.I.B. Holdings Ltd., (Respondent). (*Withdrawn*).

0920-81-U: Canadian Union of Public Employees, (Complainant) v. Gelpi General Hospital, (Respondent). (*Withdrawn*).

0932-81-U: Josse L. Gillespie, (Complainant) v. United Automobile, Aerospace & Agriculture Implement Workers of America (U.A.W.), Local 439 and Massey/Ferguson Industries, (Respondent). (*Withdrawn*).

0947-81-U: Canadian Union of Industrial Employees, (Complainant) v. Canac Kitchens, (Respondent). (*Withdrawn*).

0980-81-U: Patricia Evelyn Nolan (Complainant) v. Corah Ltd. and Amalgamated Clothing and Textile Workers Union Local 1937, (Respondent). (*Withdrawn*).

0985-81-U: Ceryl Doyle, (Complainant) v. The Fireco Employees' Association and Fireco Sales Limited, (Respondent). (*Withdrawn*).

0986-81-U: Caroline Kelly, (Complainant) v. The Fireco Employees' Association and Fireco Sales Limited, (Respondent). (*Withdrawn*).

1000-81-U: Retail Clerks Union, Local 409, (Complainant) v. Farelane Properties Ltd., (Respondent). (*Withdrawn*).

1002-81-U: Peter George, (Complainant) v. Babcock & Wilcox Canada Ltd., and United Steelworkers of America Local 2859, (Respondents). (*Withdrawn*).

1004-81-U: Maria Lima, (Complainant) v. United Food and Commercial Workers International Union, (Respondent). (*Withdrawn*).

1008-81-U: Retail, Wholesale and Department Store Union, AFL:CIO:CLC, (Complainant) v. Anco Food Products Ltd., (Respondent). (*Withdrawn*).

1024-81-U: Giuseppe Gencarelli, (Complainant) v. Sault Ste. Marie Separate School Board, (Respondent). (*Withdrawn*).

1026-81-U: Teamsters, Chauffeurs, Warehousemen and Helpers Local Union 91, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Complainant) v. Inter City News Co., (Respondent). (*Withdrawn*).

1056-81-U: Canadian Union of Industrial Employees, (Complainant) v. Canac Kitchens, (Respondent). (*Withdrawn*).

1058-81-U: Retail, Wholesale and Department Store Union, AFL:CIO:CLC:, (Complainant) v. Cambrian Maintenance of Sudbury Limited, (Respondent). (*Withdrawn*).

1074-81-U: Mr. Michael Aubertin, (Complainant) v. T.R.S. Food Service Ltd., (Respondent). (*Withdrawn*).

COMPLAINTS UNDER THE OCCUPATIONAL HEALTH AND SAFETY ACT

0625-81-OH: Employees Listed in Appendix "A" and United Steelworkers of America, (Complainants) v. Euroclean Canada Inc., (Respondent). (*Terminated*).

0942-81-OH: Denise Clendening & Lisa Clendening, (Complainant) v. Window Express Service, (Respondent). (*Withdrawn*).

APPLICATIONS FOR RELIGIOUS EXEMPTION

0690-81-M: Gerard Bradler, (Applicant) v. Energy & Chemical Workers Union, Local 593, (Respondent Trade Union) v. Gulf Canada, (Respondent Employer). (*Granted*).

APPLICATIONS FOR CONSENT TO EARLY TERMINATION OF COLLECTIVE AGREEMENT

0693-81-M: Coles Book Stores Limited, (Applicant) v. International Union of Allied, Novelty and Production Workers, Local 905, (formerly known as International Union of Doll & Toy Workers of the United States & Canada, Local 905), (Respondent) v. Canadian Paperworkers Union, (Intervener). (*Dismissed*).

0736-81-M: Gibson's Cleaners Co. Ltd., (Employer) v. Laundry, Dry Cleaning and Dye House Workers' International Union, Local 351, (Trade Union). (*Granted*).

0930-81-M: The Faculty Association of the University of Windsor, (Applicant) v. The Board of Governors of the University of Windsor, (Respondent). (*Granted*).

SALE OF A BUSINESS

0560-81-R: Hotel, Restaurant, & Cafeteria Employees Union, Local 75, (Applicant) v. Jack Moore, as Trustee for the owner of the Hotel Canadiana, (Respondent). (*Withdrawn*).

JURISDICTIONAL DISPUTES

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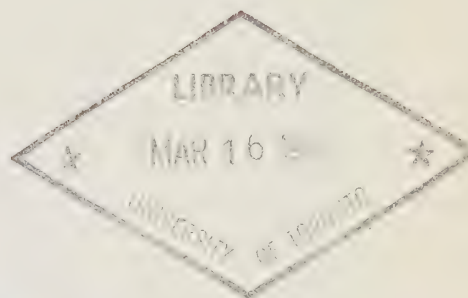
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*Ontario Labour Relations Board,
400 University Avenue,
Toronto, Ontario*

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**A Monthly Series of Decisions from the
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Certification – Charges – Membership Evidence – Practice and Procedure – Particulars on charges relating to membership evidence provided on hearing date – Whether Board permitting evidence on charges – Whether intimidation by employee causing Board to direct vote – Whether employer having standing to raise adequacy of Notice to Employees, Form 5

BEFORE: M.G. Picher, Vice-Chairman and Board Members C.G. Bourne and M.J. Fenwick.

APPEARANCES: *C.M. Mitchell and E. Mattocks for the applicant; Barbara G. Crosby, Charles W. Parker, Ronald N. McKinnon and John H. Rice for the respondent.*

DECISION OF THE BOARD; October 1, 1981

1. This is an application for certification.

• • •

3. The Board finds that the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act*.

4. Having regard to the agreement of the parties, the Board further finds that all employees of the respondent in Metropolitan Toronto save and except foremen, persons above the rank of foreman, office and sales staff and students employed during the school vacation period, constitute a unit of employees of the respondent appropriate for collective bargaining.

5. The respondent has raised two preliminary issues. Firstly, it seeks to adduce evidence of misconduct in the collection of membership evidence which it alleges would justify the taking of a representation vote. Secondly, it requests an extension of the terminal date and a reposting to the Board's Form 5 Notice to Employees in Italian as well as English.

6. With respect to the first issue, counsel for the union submits that the Board should not entertain evidence relating to the employer's charges of misconduct in the collection of membership evidence, on the grounds that no particulars of such charges were provided either to the union or to the Board prior to the hearing. The only notice of charges given is a statement in the respondent's reply to the application:

The respondent alleges that the union organizers directed threats of loss of jobs and bodily harm to employees in the course of the organizing campaign. The respondent submits that in view of the applicant's coercion and intimidation of employees a secret ballot vote should be ordered.

7. The reply was filed on September 4, 1981. A copy of it didn't reach the union until September 10, 1981, the day before the hearing of this application. In the week between the filing of the reply and the hearing the respondent made no attempt to provide particulars of its

charges. It is admitted, moreover, that the employer had knowledge of the events giving rise to its charges as early as July 29, 1981 and that the details of the incidents were available to its counsel on or about August 30, 1981. Counsel for the union submits that to entertain the charges at this time is to prejudice the applicant since it would necessitate an adjournment to permit the union to meet the case being alleged against it.

8. The need for expedition in certification proceedings is well recognized. (See *Hotel & Restaurant Employees Union v. Nick Nasney Hotels Ltd.* 70 CLLC ¶14,020 [1970], 3 O.R. 461 (C.A.); *Jordan v. York University Faculty Association* 78 CLLC ¶14,132 (Div. Ct.).) In the interest of avoiding undue delay the Board's Rules of Procedure provide in part as follows:

47. (1) Where a person intends to allege, at the hearing of an application or complaint, improper or irregular conduct by any person, he shall,

(a) include in the application or complaint; or

(b) file a notice of intention that shall contain,

a concise statement of the material facts, actions and omissions upon which he intends to rely as constituting such improper or irregular conduct, including the time when and the place where the actions or omissions complained of occurred and the names of the persons who engaged in or committed them, but not the evidence by which the material facts, actions or omissions are to be proved, and, where he alleges that the improper or irregular conduct constitutes a violation of any provision of the Act, he shall include a reference to the section or sections of the Act containing such provision

(2) Where, in the opinion of the Board, a person has not filed notice of intention promptly upon discovering the alleged improper or irregular conduct, he shall not adduce evidence at the hearing of the application of such facts, except with the consent of the Board and, if the Board deems it advisable to give such consent, it may do so upon such terms and conditions as it considers advisable.

9. In this case the respondent made no attempt to bring the specific facts alleged to the attention of the applicant until the very day of the hearing. It did so notwithstanding its knowledge of the facts to be alleged for a number of weeks before that date. Neither the respondent nor its counsel have advanced any excuse to satisfactorily explain this apparent silence.

10. The facts of this case are similar to those before the Board in *Cable Tech Wire Company Limited* [1978] OLRB Rep. June 496. In that case counsel for the employer filed charges in a certification on Friday June 9, 1978, the last business day before the hearing. In that case the Board commented at pp 497-98:

In view of the fact, admitted by counsel for the respondent, that the respondent had knowledge of these allegations as early as May 26, 1978 and did nothing to advise either the Board or the applicant of the alleged

misconduct until the last business day before the hearing, the Board did not allow the respondent to adduce evidence in respect of those allegations. The reason put forth by counsel for the respondent to explain the delay, namely that it did not know until the Friday prior to the Monday hearing that witnesses would be available to testify to the allegations, is not sufficient reason to have withheld them virtually until the eve of the hearing. The delaying of serious allegations operates to the obvious prejudice of an applicant for certification. It can have little or no opportunity to investigate and prepare to meet the allegations made against it. The union is moreover prejudiced in that it might be required to seek an adjournment of its application to meet the case made against it, in the event that evidence is heard, thereby occasioning delay in the certification process that can itself cause serious harm to the applicant's position, regardless of the merits of the charges made.

For these reasons the Board has in the past declined to hear evidence of allegations filed in certification proceedings virtually at the hearing room door where it appears that there was no sufficient reason for the withholding of the allegations (see *Fleck Manufacturing Limited* 62 CLLC ¶ 16,236), and for these reasons it did so in this case.

The circumstances of this case are virtually on all fours with those in *Cable Tech, supra*. Absent an acceptable explanation for the respondent's failure to provide particulars in a timely manner, we see no reason to draw any different conclusion in this case. The Board therefore declines to entertain the charges contained in the respondent's reply.

11. We should add that, in the alternative, having obtained from counsel for the respondent a full statement of the wrongdoing alleged, if we did admit the allegations and accept them as proved, the respondent's request for a representation vote would not succeed.

12. The acts of intimidation alleged concern conversations between one employee and two other rank-and-file employees sympathetic to the union. One of the union sympathizers is alleged to have told the employee that she might lose her job if she didn't join the union. The second union supporter, also a female, is alleged to have told the same employee that if she should hear that she had "told someone" (presumably referring to telling management about the union) "I'm going to kill you." When the employee in question was subsequently in the process of seeking out a member of management it is alleged that the same two employees approached her together and said "Please don't tell the front office."

13. Unfortunate as it may be, it is not uncommon for antagonism to be generated between employees who line up on opposite sides of a campaign for union representation. Statements by any person amounting to intimidation or coercion of an employee, whether they are made for or against a union, are clearly contrary to section 70 of the *Labour Relations Act* and are grounds for a complaint under section 89 of the Act. They may also form the basis for criminal charges. It does not follow, however, that the indiscretions of employees, whether they favour a union or sympathize with their employer, are to be held against the principal parties to an application for certification. The Board can no more hold against a union a verbal threat made to an employee's job security by an indiscrete employee who is neither a union officer nor a collector of union membership cards than it can hold against an employer similar

threats made by a fervently anti-union employee acting on his own. Evidence of widespread threats which are made by neither the employer nor the union might, of course, cause the Board to resort to the further evidence of a representation vote.

14. In the instant case there are 117 employees in the bargaining unit. Sixty-seven have signed union membership applications. There is no suggestion in the allegations nor did the respondent seek to prove that any union officer or agent nor any employee acting as a collector of membership evidence engaged in any conduct contrary to the Act. It appears that the facts relating to the one employee, if proved, would establish an isolated instance, and would not substantiate the existence of a widespread climate of fear that might reasonably call into question the true wishes of the employees. In these circumstances the allegations, if proved, would not have caused the Board to order the taking of a representation vote.

15. We turn to consider the second preliminary submission of the respondent. It states that because some fifty per cent of its employees are functionally illiterate in English, being primarily of Italian background, the Board's notice to employees of the application should be posted in Italian as well as English. No employee has appeared or intervened to endorse that request. Moreover, there was nothing to prevent the respondent from providing its own translation of the Board's notice. By its own admission the employer frequently translates its own notices to employees in Italian.

16. The facts of this case are similar to those in *Federated Building Maintenance Co.* [1979] OLRB Rep. Oct. 974. The Board in that case stated the facts and its conclusions as follows:

The employer has raised an objection to these proceedings. It submits that the employees were given insufficient notice of the union's application for certification and of the hearing before this Board.

There are some 125 employees in the bargaining unit, comprising the cleaning staff of the First Canadian Place in Toronto. Following the Board's normal practice copies of the Board's Notice to Employees of Application for Certification and of Hearing (Form 5) were posted in various locations in their workplace. It is common ground that 80 per cent of the employees are of Portuguese origin and cannot read English. They could not, in other words, understand the meaning of Form 5 without assistance.

The employer submits that because the notices were not posted in Portuguese the employees have been denied natural justice. It requests that the application be delayed by the extension of the terminal date and a reposting of Form 5 in Portuguese. Alternatively it submits that the Board should order the taking of a representation vote with notices and ballots in both English and Portuguese.

In effect the employer seeks to protest on behalf of a group of employees when in fact the employees themselves have raised no objection. . . .

The first issue is whether the employer has standing to make procedural

objections on behalf of employees who have not themselves sought to do so. Generally this Board's experience has led it to respect the ability of employees to represent their interest in applications before the Board. The Board does not, as a general rule, permit an employer to speak for the employees in certification proceedings. The Board will entertain the evidence and representations of an employer respecting allegations of fraud, intimidation or coercion in the gathering of membership evidence. In those cases the employer is entitled to object, firstly, because it has a direct interest not to be party to a collective bargaining relationship based on bargaining rights illegally obtained; and, secondly, because the very unlawfulness alleged would tend to deprive the employees of the ability to freely represent their wishes. Apart from those extreme circumstances amounting to fraud upon its own procedures, the Board does not place the employer in the position of spokesman for its employees.

The Board's practice in that regard is consistent with a number of decisions of the Supreme Court of Canada. In *Quebec Labour Relations Board v. Cimon Ltee*, [1971] S.C.R.; 21 D.L.R. (3d) 506 on an application for certification an employer sought to set aside an order of the Quebec Labour Relations Board directing a representation vote among its employees on the grounds that a second union had not been given notice of the application. The Court upheld the ruling of the board, finding that the company was unlawfully pleading on another's behalf an objection in which it had no legal interest. A case more closely resembling this one is *Cunningham Drug Stores Ltd. v. B.C. Labour Relations Board* [1973] S.C.R. 256; 31 D.L.R. (3d) 459. In that case the Court found that during an application for certification an employer was without standing to object to the sufficiency of notice to employees affected by a ruling of the British Columbia Labour Relations Board altering the composition of the bargaining unit.

A more recent decision of the Supreme Court of Canada demonstrates even more forcefully the Court's appreciation of the concerns that labour boards have whenever employers purport to invoke the rights of their employees in certification proceedings. In *Re Canada Labour Relations Board and Transair Ltd.* (1976), 67 D.L.R. (3d) 421 the employer argued before the Court that the Canada Labour Relations Board had erred in refusing to entertain a petition against certification by a group of employees. The petition, tendered late in the certification proceedings, was found by the Board to be untimely. The employees who sponsored the petition did not seek judicial review of the ruling against them and the employer did not seek to make them a party to its own application for judicial review under section 28 of the *Federal Court Act*. The Court concluded that the employer was without standing to invoke an alleged error of law in which it had no legal interest. Laskin, C.J.C., speaking for the majority, said at p. 438:

"If there is any policy in the *Canada Labour Code* and comparable provincial legislation which is pre-eminent it is that it is the wishes

of the employees without intercession of the employer (apart from fraud), that are alone to be considered vis-a-vis a bargaining agent that seeks to represent them. The employer cannot invoke what is a *jus tertii*, especially when those whose position is asserted by the employer are not before the Court."

The foregoing reasoning is manifestly applicable in this case. Any objection that the employees have had insufficient notice of this application or are in a state of confusion about their rights, there being no fraud or impropriety alleged, is a matter for the employees themselves to raise. The employer is without standing to plead the objection which it makes. Its motion is therefore dismissed.

17. In the circumstances of this case we see no reason to depart from the Board's reasoning and conclusions in *Federal Building Maintenance Ltd.*, *supra*. The respondent's request that the Board post its Notice to Employees in Italian is therefore denied.

18. The Board is satisfied on the basis of all the evidence before it that more than fifty-five per cent of the employees of the respondent in the bargaining unit at the time the application was made, were members of the applicant on September 4, 1981, the terminal date fixed for this application and the date which the Board determines under 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

19. A certificate will issue to the applicant.

1820-77-R Ontario Nurses' Association, Applicant, v. Arnprior and District Memorial Hospital, Respondent, v. Group of Employees, Objectors

Bargaining Unit – Reconsideration – Board granting bargaining units upon agreement – Parties amending units through scope clause in collective agreements – Subsequently seeking clarification of scope of units – Board refusing to clarify units in agreement

BEFORE: R. A. Furness, Vice-Chairman, and Board Members D. B. Archer and W. H. Wightman.

DECISION OF THE BOARD; October 16, 1981

1. In a decision dated August 25, 1981, the Board informed the parties that it was not prepared, in the exercise of its discretion under section 95(1), to reconsider its earlier decision in this matter dated April 12, 1978.

2. On September 29, 1981, the Board received a further letter from the respondent. In this letter the respondent has emphasized that it was neither seeking to have the Board vary the

certificate nor requesting the Board to reconsider the scope of the bargaining rights as granted per the certificates of April 12, 1978. The respondent has also emphasized that it is requesting a clarification as to whether or not bargaining rights were being granted vis-a-vis the Arnprior and District Memorial Hospital Nursing Home in view of the fact that at all material times during the certification process the Nursing Home was not in existence and there were no persons in the employ of the Nursing Home.

3. The respondent has adopted the position that such a clarification would be necessary should the matter proceed to arbitration. The respondent has stated that if in fact the Board was not extending bargaining rights to include the Nursing Home at the time that the certificate was issued, then it would be a matter of evidence and argument, before a board of arbitration, as to whether or not the recognition clause as amended and incorporated in the collective agreement was intended to extend to the employees of the Nursing Home. The respondent submitted that a clarification of the scope of the original certificate vis-a-vis the Nursing Home is essential in order for a board of arbitration to properly determine the scope of the recognition clause under the present collective agreement.

4. The applicant and the respondent are involved in a dispute over whether employees of the Nursing Home are covered by a collective agreement. The Board issued two certificates to the applicant on April 12, 1978. The bargaining units in these certificates were determined upon the agreement of the parties. At that time neither of the parties requested the Board to clarify its decision by means of the use of a clarity note. Moreover, the parties amended the bargaining units defined in the certificates when they entered into their collective agreements. In its decision dated August 25, 1981, the Board referred to its view that when an agreement has been made following certification, the bargaining rights of the parties flow from the agreement rather than from the original certification. This view applies with even greater force where the parties have varied the description of the bargaining units which are now contained in two collective agreements.

5. The time for any of the parties to seek clarification was at the time when the Board issued certificates to the applicant and before the collective agreements were entered into. In asking the Board to clarify its decision, in the circumstances of this request, the respondent is asking the Board to vary its decision by adding to or subtracting from the clear wording of the two bargaining units set forth in the decision dated April 12, 1978.

6. By virtue of section 106(1), the Board may, in the exercise of its discretion, reconsider, vary or revoke its decision. However, the Board is not prepared to vary its decision dated April 12, 1978, because the parties have themselves varied the decision by amending the bargaining units and determining the scope of the recognition clauses in their collective agreements. Differences between the parties concerning the interpretation, application, administration or alleged violation of the collective agreements are more properly to be resolved through a process of arbitration and not through a clarification or variation of two bargaining units which were determined by the Board on the agreement of the parties.

2710-80-U Marcel Fortin, Complainant, v. **Bedard Girard Ontario**,
Division of B G Checo International Limited and Millwright Local 1425,
United Brotherhood of Carpenters and Joiners of America, Respondents

Duty of Fair Representation – Interference in Unions – Practice and Procedure – Union refusing, discouraging and delaying filing of grievances – Whether processing of grievance arbitrary – Whether complainant discharged because of filing of overtime grievance – Whether filing of grievance lawful exercise of right under Act – Board policy on deferring to arbitration – Board directing immediate arbitration of amended grievances

BEFORE: R. D. Howe, Vice-Chairman, and Board Members C. A. Ballentine and E. J. Brady.

***APPEARANCES:** Marcel Fortin for the applicant; Edward Ryan for the respondent.*

DECISION OF R.D. HOWE, VICE-CHAIRMAN AND BOARD MEMBER E.J. BRADY; October 2, 1981

1. This is a complaint under section 89 of the *Labour Relations Act* in which the complainant alleges that he has been dealt with contrary to the provisions of section 66(a), 68, 80(1)(d) and 80(2)(a) of the Act.

• • •

3. Although the complaint as filed names only the Company as respondent in this matter, it also names "Millwright Local 1425" (hereinafter referred to as the "Union") as a trade union that may be affected by the complaint. Accordingly, the Union was duly notified of these proceedings. In view of the fact that the complaint contains allegations of violations of the Act by the Union, the Board directed at the hearing of this matter on September 9, 1981, that the Union be added as a respondent to this complaint, pursuant to Rule 54 of the Board's Rules of Procedure. Accordingly, the style of cause of this matter is amended as to add "Millwright Local 1425, United Brotherhood of Carpenters and Joiners of America" as a respondent.

4. Since no one appeared on behalf of the respondent Company at the commencement of the hearing of this matter on September 9, 1981, the hearing was recessed until 10:00 a.m. as a matter of courtesy in view of the possibility that the Company representative might have been delayed. However, since no one had appeared on behalf of the Company by 10:00 a.m. that day, the Board proceeded to hear the complaint.

5. By decision dated August 4, 1981, the Board, differently constituted, dismissed this complaint because no one had appeared for the complainant at the hearing on July 29, 1981. In a telegram dated August 17, 1981, the complainant requested that the Board reconsider that decision since he had not received notice of the July 29, 1981 hearing. At the September 9, 1981 hearing of this matter, the complainant testified that he did not receive notice of the July 29, 1981 hearing until after the date of that hearing due to the mail strike. Accordingly, at the September 9, 1981 hearing the Board, pursuant to section 95(1) of the Act, reconsidered and revoked its previous decision in this matter, and proceeded to hear the evidence and representations of the complainant and the Union with respect to the complaint.

6. The complainant testified before the Board concerning the events which gave rise to this complaint. We found him to be an honest and reliable witness whose candid testimony was uncontradicted by any other evidence. Mr. Ryan, who represented the Union at the hearing of this matter, elected not to cross-examine Mr. Fortin and told the Board that his (Mr. Fortin's) evidence was "pretty correct". Since the complainant did not allege or prove facts that would constitute a breach of section 80(1)(d) or section 80(2)(a) of the Act, this decision will deal only with the alleged violations of sections 66(a) and 68.

7. The complainant commenced employment with the Company in July of 1980 at the "Denison Mine Project". Approximately three weeks later he came to be of the view that the Company was unfairly distributing overtime and that it was not offering him his fair share of overtime hours. (Article 5(g) of the Collective Agreement that was binding on the parties to this complaint at all material times provides, in part, as follows: "All overtime shall be divided as equally as possible amongst all employees.") When Mr. Fortin complained to his foreman about the unfair distribution of overtime and told him that he wanted to see a steward about it, the foreman refused to permit him to do so. He further testified: "All of the foremen got on my back for the next few days, aggravating me. They'd check on me every fifteen minutes — made sure I stayed on the site because they knew I wanted to see a steward." The complainant, who wanted to file a grievance concerning distribution of overtime, discussed the matter with Union steward Bill Frolic, Business Agent Dave Stewart and an assistant steward. Each of them attempted to discourage him from grieving the matter. Indeed, it was the complainant's uncontradicted evidence that Mr. Stewart's response to him was: "Do your job and keep your mouth shut. Don't be a shit-disturber."

8. After the complainant continued for two weeks to "push hard" for a grievance to be filed, Mr. Stewart prepared a written grievance but refused to divulge its contents to the complainant and continued to attempt to persuade him to drop the matter. The complainant, who was becoming increasingly discouraged by the Union's lack of action, telephoned Edward Ryan, the Secretary-Treasurer of the Millwright District Council of Ontario, and told him of his disappointment with the Union. He also told Mr. Ryan: "I probably stand a pretty good chance of losing my job over the overtime grievance." Although Mr. Ryan testified before the Board, he was unable to recall that telephone conversation. Thus, there is no evidence of what, if any, steps Mr. Ryan took as a result of the call to investigate Mr. Fortin's complaint and ensure that the local officials of the Union were representing him in a manner that was not arbitrary, discriminatory or in bad faith.

9. In an attempt to have Mr. Stewart "commit himself [to the grievance] in front of the members", the complainant asked Mr. Stewart to "read the grievance out loud" at a Union meeting in Sudbury. The complainant's uncontradicted evidence concerning Mr. Stewart's response was: "He said: 'Do you want to read the fuckin' thing or do you want me to read it.' He said this in front of the membership just to embarrass me. He got very angry."

10. After that meeting, Mr. Stewart filed the following grievance:

"This Millwright Local Union 1425 Sudbury hereby register [sic] this grievance against Bedard Gerard Ont. Ltd. Whereas on August 9-10, 1980 the Company used Permit Millwrights to work overtime while Millwright Members of Local 1425 were not given the opportunity to work. [sic]

A list of all the Permit Millwrights was submitted to the company on July 31, 1980 signed by myself and it was my understanding in the discussions with Cleo Charron that members of L.U. 1425 will be given the first chance to work overtime.

Article 2A and 2H of the Collective Agreement was violated by the Company.

The Union is claiming wages in the amount of 8 hours double time for Saturday August 9, 1980 and 8 hours double time for Sunday August 10, 1980 for the enclosed list of Millwright members of L.U. 1425 32 hours at \$12.88 per hour \$410.16 10% Vac. pay \$41.01 total: \$451.17 for each member listed.

Marcel Fortin 420-823-643
 Denis Soper 417-030-459
 Patrick Valliquette 425-004-058.

The Union is requesting all monies to be sent to the Union Office by registered mail at 266 Hemlock Street, Sudbury, Ontario."

11. The wording of that grievance was not satisfactory to the complainant in that it was limited to one weekend (August 9 and 10) even though he had complained to Mr. Stewart that more than one overtime weekend was involved. Moreover, the grievance made no reference to Article 5(g) (quoted above) which requires that all overtime "be divided as equally as possible amongst all employees"; it was the Company's alleged failure to comply with that obligation that was the gist of Mr. Fortin's complaint.

12. On August 12, 1980, the complainant suffered a minor shoulder injury at work while "turning a drive" on a mill. Later that day he was examined by a physician who certified that he was fit to resume work on August 13, 1980, but suggested that he be placed on light duty for three days (from August 13 to 15). When the complainant brought that medical certificate to the Company, he stated that if there was no light work, he would go on Workmen's Compensation. Management's response was: "No, no. We'd rather you work than collect Compensation." Accordingly, the complainant returned to work on August 13th. Near the middle of the shift on August 14th, the complainant's foreman took the complainant's work partner aside and asked him to work overtime, but offered no overtime to the complainant. It was the complainant's uncontradicted evidence that this had occurred several times before and that the foreman did it "just to aggravate [him]". The complainant then told the foreman that his shoulder was bothering him and that he was going to take the rest of the week off. When the foreman asked if he would be back on Monday (August 18th) the complainant replied in the affirmative.

13. On the following day (August 15, 1980) the complainant received the following telegram from the Company:

"Please be advise [sic] that your services are not required any longer on Denison Mines job as Millwright for BG Checo. Your dues, if any, will be forwarded to your home, shortly.

E. Patrie General Foreman BG Checo (Bedard Girard Ontario)"

14. The reason for discharge specified by the Company on the complainant's (Unemployment Insurance) Record of Employment was "Lack of Production". The following document dated August 14, 1980 was also mailed to the complainant by the Company:

"REASON FOR BEING FIRED

TITRE M. FORTIN
420-823-643

Refused to work. He said he wanted to see the Stewart. [sic] Reason, he said his foreman, Gilles Boucher told an apprentice how he wanted the job done.

August 12/80, left for 1 hour. Did not inform his foreman. John Lagace, his foreman warned him not to leave work area without seeing him.

August 14/80. Left work area again for 1½ hour without asking his foreman, John McCormack. When he asked what he was doing, said he was looking for a shop Stewart. [sic] Also said he asked his foreman for permission to leave work area. Foreman was *not* informed.

(Signed) E. Patry"

15. After being discharged the complainant called Mr. Stewart and asked him what the procedure was for filing a discharge grievance. Mr. Stewart told the complainant that he had to write up his own grievance and give a copy of it to him. Accordingly, the complainant prepared the following grievance on August 23, 1980 and gave it to Mr. Stewart:

"I am forwarding a grievance against B. G. Checo Denison Project Elliot Lake Ont.

On Aug. 15, 1980, I was fired without just cause. Contrary to Collective Agreement Article 9-F.

Also reason given by Cheeco [sic] on record of employment Ser. #924589L (lack of production) Cannot apply as I was on light duty at the time of my firing . . . by telegram. [sic]

Request investigation, as well as back pay, including weekend overtime, pay lost as direct result of firing.

(signed) Marcel Fortin"

(Article 9(f) provides: "No employee shall be dismissed or laid off except during his working hours.")

16. A month later, Mr. Stewart filed the following grievance dated September 23, 1980:

"This Millwright Local Union 1425 hereby registers [sic] this grievance against Bedard Gerard Ontario.

WHEREAS: Marcel Fortin, S.I.N. 420 823 643, worked for your company as a millwright on the Denison Mine project.

A telex was sent to Mr. Fortin on August 15, 1980 informing him that his services were no longer required by your company and signed by Eugene Patry, General Foreman. This is in violation of Article 9 of the Collective Agreement.

The Union claims waiting time for Mr. Fortin for August 15, 18, 19, 20 and 21, 1980, five days at eight hours per day — 40 hours at \$12.80 per hour = \$512.00 plus 10% vacation pay, \$51.20 for a total of \$563.20.

According to Mr. Fortin, he was on light duty, due to an injury while working on the job. His record of Employment, dated August 14, 1980 states that he was fired for lack of production.

The Union takes the position that due to Mr. Fortin's being on light duty, he was fired without just cause and that the statement on his record of employment should be corrected."

The Union provided the Board with no explanation whatsoever concerning the one month delay in filing the complainant's discharge grievance.

17. On October 10, 1980, the Company replied to the grievance as follows:

"Mr. Fortin was dismissed from his job due to a lack of production, this was the reason stated on his separation certificate and is backed up by a signed statement from his General Foreman and Foreman. [sic] We have attached a copy of this statement.

We would request at this time a copy of proof of delivery of Mr. Fortin's separation papers and cheque.

Further consideration to this claim will not be made until such proof is received.

Yours very truly,

BEDARD GIRARD ONTARIO
Div of BG Checo International Ltd.

(signed) Harry Budden
Office Manager"

On that same day, the Company also answered the overtime grievance in a letter that states:

"On August 9th and 10th of 1980, we requested that all men who were willing to work, could work, We were only able to obtain 27 men who would work.

The night shift which had been running all week long was to terminate on the evening of the 9th and all men working on the night shift could start work again on the day shift on Sunday morning. This crew of men included some card men.

During this period of time we did not refuse any men. If the men did not work the days of the 9th and 10th, it was of their own choice.

Taking all these facts into consideration we are refusing this grievance as presented."

18. It was the complainant's evidence that "everything in the answer is false". Although the evidence is somewhat unclear on this point, it appears that the overtime grievance was then further discussed with the Company (at what appears to have been the second step of the three step grievance procedure) without success. The complainant was provided with very little information concerning the processing of his grievances, despite the fact that he "called the Business Agent at least once a week to ask where [the grievances] stood." When the complainant became aware that the grievances had not succeeded and that the Union had decided to take no further action with respect to them, he again called Mr. Ryan to complain about the lack of representation that he was receiving from the Union. After contacting Mr. Stewart and reviewing the matter, Mr. Ryan sent to Mr. Fortin the following letter dated February 19, 1981:

"Dear Sir & Brother:

As per our telephone conversation, I have investigated your grievance against B G. Checo International Limited and find that the Local Union did comply with the procedure.

However, on checking the correspondence from Local Union 1425 and the reply from the Company, I feel that the Union is not in a position to take any further action and the matter is closed.

Please contact me by mail if you have any further queries."

The complainant then prepared and filed the instant complaint with the Board, with the assistance of a member of the Executive of Local 1425. After being served with the complaint, the Union attempted to settle it with the assistance of Labour Relations Officer Norman Harper. By letter dated April 3, 1981, Mr. Ryan advised the complainant as follows:

"This is to advise that I met with Representatives of the Association of Millwrighting Contractors of Ontario on Thursday, April 2nd, 1981, and they have agreed to deal with your complaint against B. G. Checo International Limited on Tuesday, April 28th, 1981.

I have contacted Mr. Norman Harper of the Ontario Labour Relations Board and he agreed that this would be the best approach. He further agrees with my suggestion that you adjourn your grievance at the Board sine die.

Trusting that in the interest of the Brotherhood you will agree with my suggestion so that the matter can be resolved. [sic]

Mr. Harper has indicated that you call him at 416-965-5912 for any further advice on this matter.

Upon receipt of this correspondence, would you please contact me by calling collect at 416-789-0621 and advising me of your decision."

The complainant subsequently agreed to the approach advocated by Mr. Ryan. In his testimony before the Board, Mr. Ryan provided no explanation for the Union's striking shift from "not [being] in a position to take any further action" on the matter, which was said in his letter of February 19, 1981 to be "closed", to being in a position to refer the grievances to another step in the grievance procedure. It appears from the evidence that the only new circumstance which existed was the fact that Mr. Fortin had filed this complaint with the Board.

19. "Step Three" is the final step in the grievance procedure. It is described as follows in Article 11 of the Collective Agreement:

"STEP THREE:

"If the matter is not settled in Step Two the complaining party shall refer the written complaint forthwith to the Labour-Management Relations Committee of the Association and the Council. Both parties shall be entitled to have representatives at the meetings of this Committee to present their side of the matter.

The Committee shall consist of three (3) members from the Association and three (3) members from the Council. No member directly involved in the grievance shall sit on the Committee.

If the Labour-Management Relations Committee fails to resolve the matter to the satisfaction of both parties within a period of two (2) weeks from the time the written complaint was received by the Committee, or such further period as may be agreed upon between the parties, this step shall be deemed to have been complied with."

20. The April 28th "grievance meeting" was attended by three representatives of the Association of Millwrighting Contractors of Ontario (which is one of the parties to the Collective Agreement binding upon the parties to this application) and three representatives of the Company. Also in attendance were three representatives of the Millwright District Council of Ontario (Mr. Ryan and the business agents of two other Millwright locals) and Mr. Stewart, who represented Local 1425. The complainant appeared before the Committee and stated his position, including his allegation that he was discharged for grieving the overtime distribution. However, Mr. Ryan, who was one of the six Committee members who voted unanimously that the grievances be denied, appears not to have given any consideration to that allegation. Instead, he based his decision on the fact that there was no provision for "light duty" in the Collective Agreement. From Mr. Ryan's testimony it is clear that his approach to the

grievances was to assume that whatever the Company said was correct. For example, when asked by Board Member Brady if a statement contained in the minutes of that grievance meeting ("the Company stated that the Millwright Shop Steward was advised of the number of millwrights that would be required to work and he was responsible to ensure that the overtime was distributed equally") was correct, Mr. Ryan stated: "I have to assume that if the Company said it, it was correct." Similarly, in the face of a vehement denial by the complainant of its veracity, Mr. Ryan accepted without question a statement by the Company that a mistake by a physician had resulted in a "light duty" medical report being issued in respect of the complainant when it should (allegedly) have been issued in respect of another employee. Having regard to all of the circumstances, we infer that the approach adopted by the other Council members on the Committee was similar to that of Mr. Ryan.

21. By letter dated June 22, 1981, Mr. Ryan advised the complainant that the Labour-Management Committee had denied his overtime and discharge grievances as the Committee had found that the Company was not in violation of the Collective Agreement. The complainant's testimony concerning his reaction to that letter was:

"After getting that discouraging result, I called Mr. Ryan. He suggested that I drop the matter because it would cost the Union a lot of money to proceed, etc., etc. I said I wouldn't drop it."

22. Mr. Ryan was the only witness who testified on behalf of the Union. Although he was able to provide the Board with some information concerning the step three grievance meeting, he was unable to give any evidence concerning the events which gave rise to the grievances or the way in which the grievances were handled by the officials of Millwright Local 1425. His testimony in this regard was: "I don't know what happened in Sudbury. I just became involved at the Council level." He also told the Board: "When I hear more about it, maybe there is something to it. That's the Local Union's problem."

23. There is no evidence before the Board that the Union gave any consideration to referring either or both of the complainant's grievances to arbitration under the Collective Agreement or under section 124 of the *Labour Relations Act*. There is also no evidence that the Union gave any consideration to filing a complaint with the Board that Mr. Fortin was discharged for causing a grievance to be filed with respect to distribution of overtime.

24. Mr. Ryan stated that the complainant's full loss as a result of his discharge was only one week's wages because "there's all that the claim was for [in the grievance]" and because the complainant was called to work at another construction site a week later. However, the evidence clearly indicates that the complainant requested the Union to grieve for full compensation for all lost pay resulting from his discharge (including weekend overtime). Moreover, it was the uncontradicted evidence of the complainant that when he was called in to work at another site following his discharge, he only had two days' work, after which he was "off for three or four months". The evidence indicates that the Dennison Mine project (from which the complainant was discharged by the Company) "finished around October of 1980".

25. Section 68 of the Act provides:

"68. A trade union or council of trade unions, so long as it continues to be entitled to represent employees in a bargaining unit, shall not act in a

manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit, whether or not members of the trade union or of any constituent union of the council of trade unions, as the case may be.

In *I.T.E. Industries Limited*, [1980] OLRB Rep. July 1001, the Board described the scope and effect of section 68 as follows:

“17. . . .

The Labour Relations Act constitutes the trade union as the employees' exclusive bargaining agent. Within the framework of collective bargaining an employee must depend upon the union to represent him, and cannot bargain individually to establish his terms and conditions of employment. However, the trade union's right to represent employees is not unfettered, and its exclusive bargaining agency carries with it a commensurate responsibility: the union must represent each employee in the bargaining unit, in a manner that is neither 'arbitrary, discriminatory, or in bad faith.' By enacting section 60 the Legislature has sought to temper the union's authority and prevent abuses which might arise if the authority was entirely unreviewable.

18. Bad faith, malice, discrimination, or subjective ill will are clearly proscribed and readily ascertainable; the real difficulty is to determine when a union's conduct may be properly regarded as “arbitrary” — bearing in mind that the union's affairs may be conducted by laymen with limited formal education, or elected officials who may have been chosen for qualities other than their legal training or understanding of parliamentary procedure. While the Legislature undoubtedly sought to protect the employee from an abuse of the union's authority, I do not think it was intended that every miscalculation, honest mistake, or error in judgement would constitute a breach of a public statute. The standard to which a union must adhere was described in *Ford Motor Company Limited*, [1973] OLRB Rep. Oct. 519 as follows (at paragraph 40):

‘40. In deciding whether a union has violated the Act the standards to be applied are important. We recognize that union affairs are conducted for the most part by laymen. In some situations there are experienced full time officials of a trade union who conduct the union affairs; in other situations, the union affairs are conducted by employees in their spare time, while in yet other situations employees may be given a limited amount of paid time by their employers to engage in trade union matters. This Board does not decide cases on the basis of whether a mistake may have been made or whether there was negligence, nor is the standard based on what this Board might have done in a particular situation after having the leisure and time to reflect upon the merits. Rather, the standard must consider the persons who are performing the collective bargaining functions, the norms of the industrial community and

the measures and solutions that have gained acceptance within that community; see *Fisher v. Pemberton et al.* 8 D.L.R. (3d) 521 at p. 546.'

Similar views were expressed in *Re: Ontario Hydro Employees' Union — CUPE Local 1000 and Walter Prinesdomu*, [1975] OLRB Rep. May 444, at p. 462 ff. in a long passage which canvassed the intended meaning of the word 'arbitrary'.

'In using the word arbitrary both the United States Supreme Court and the Legislature of this Province must have envisaged the duty constituting more than the simple castigation of subjective ill-will in that any other interpretation would render the use of this word superfluous. Thus, a well known rule of both statutory and contractual construction militates against the respondent's particular submissions in this regard. But where does this path lead? Some insight is gained from the *Vaca* case wherein Mr. Justice White juxtaposed the word arbitrary with the word 'perfunctory' and observed that a trade union, 'in a non arbitrary manner [must] make decisions as to the merits of particular grievances'. It could be said that this description of the duty requires the exclusive bargaining agent to put 'its mind' to the merits of a grievance and attempt to engage in a process of rational decision-making that cannot be branded as implausible or capricious.

26. This approach gives the word arbitrary some independent meaning beyond subjective ill-will, but, at the same time, it lacks any precise parameters and thus is extremely difficult to apply. Moreover, attempts at a more precise adumbration have to reconcile the apparent consensus that it is necessary to distinguish arbitrariness (whatever it means) from mere errors in judgment, mistakes, negligence and unbecoming laxness. . . .

On the other hand we do not believe, at least at this time, that all mistakes and careless conduct by trade union officials fall outside the scope of section 60. It may be difficult to elaborate the precise meaning of arbitrary representation in advance but, as noted above, the very use of the word suggests that some regulation of the quality of decision-making was intended. Accordingly at least flagrant errors in processing grievances—errors consistent with a 'not caring' attitude must be inconsistent with the duty of fair representation. An approach to a grievance may be wrong or a provision inadvertently overlooked and section 60 has no application. The duty is not designed to remedy these kinds of errors. But when the importance of the grievance is taken into account and the experience and identity of the decision-maker ascertained the Board may decide that a course of conduct is so implausible, so summary or so reckless to be unworthy of protection. Such circumstances cannot and should not be distinguished from a blind refusal to consider the

complaint. However, each case must be decided on its own peculiar facts and it is clear that the duty is not going to be a fertile field for the individual adversely affected by less flagrant conduct.'

19. It is clear that in order to establish a breach of section 60, a complainant must do more than demonstrate an honest mistake or even negligence. The union must have committed a 'flagrant error' consistent with a 'non caring attitude', or have acted in a manner that is 'implausible' or 'so reckless as to be unworthy of protection'. In other words, the trade union's conduct must be so unreasonable, capricious, or grossly negligent, that the Board can conclude that the union simply did not give sufficient consideration to the individual employee's concerns. Honest mistakes or innocent misunderstandings are clearly beyond these parameters and do not attract liability."

26. On the evidence before it, the Board has no hesitation in finding that the respondent Union acted arbitrarily in the representation of the complainant, contrary to section 68 of the Act. Viewed in totality, Business Agent Dave Stewart's initial refusal to file an overtime grievance on behalf of the complainant whom he told to "keep [his] mouth shut ...", preparation of an overtime grievance that did not properly reflect the complainant's concerns, refusal to divulge the contents of the overtime grievance to the complainant, hostile reaction to the complainant's request that he "read the [overtime] grievance out loud" at a union meeting, repeated attempts to dissuade the complainant from pursuing his overtime grievance, unexplained one month delay in filing the complainant's discharge grievance, failure to file a discharge grievance that reflected the totality of Mr. Fortin's claim and failure to keep the complainant informed of the progress of his grievances despite repeated requests by the complainant, demonstrate a capricious, non-caring attitude which violates section 68 of the Act. That attitude is also evident on the part of Mr. Ryan who informed the complainant that the Union was "not in a position to take any further action" concerning his grievances, even though the grievances had not yet been referred to the third step of the grievance procedure. That referring the grievances to the third step was an available and appropriate procedure is aptly demonstrated by the fact that precisely that was done after Mr. Fortin prodded the Union into action by filing this complaint. However, even at the third step the only Union official who testified at the hearing acted arbitrarily by accepting without question the representations of the Company, notwithstanding the complainant's vehement denial of their veracity and notwithstanding the apparent lack of any real investigation by local Union officials into the actual circumstances which gave rise to the grievance in question. Moreover, as indicated above, there is no evidence that Union officials gave any consideration to referring either or both of the complainant's grievances to arbitration, or gave any consideration to filing a complaint with this Board that Mr. Fortin was discharged for causing a grievance to be filed with respect to distribution of overtime. Non-arbitrary handling of grievances requires greater consideration of an individual employee's concerns, particularly where one of those concerns is that the employee was discharged for filing a grievance, an instrument of justice in the workplace which is one of the major goals of the trade union movement. The potentially harsh economic consequences of a discharge and its potential adverse effect upon a worker's future employment prospects underline the relatively great importance of a discharge grievance to a grievor such as the complainant in the present case, and the need for serious and informed consideration to be given to the drafting and processing of such grievances, and to the decision of whether or not to refer such grievances to arbitration.

27. For the foregoing reasons, the Board finds that the respondent Union breached section 68 of the Act.

28. As noted above, the complainant has alleged not only that the respondent Union breached section 68 of the Act, but also that the respondent Company breached section 66(a) of the Act. That provision reads as follows:

“68. No employer, employer’s organization or person acting on behalf of an employer or an employers’ organization,

(a) shall refuse to employ or to continue to employ a person, or discriminate against a person in regard to employment or any term or condition of employment because the person was or is a member of a trade union or was or is exercising any other rights under this Act;

29. Also relevant to this aspect of the case is section 89 which provides in part as follows:

“89.-(4) Where a labour relations officer is unable to effect a settlement of the matter complained of or where the Board in its discretion considers it advisable to dispense with an inquiry by a labour relations officer, the Board may inquire into the complaint of a contravention of this Act

(5) On an inquiry by the Board into a complaint under subsection 4 that a person has been refused employment, discharged, discriminated against, threatened, coerced, intimidated or otherwise dealt with contrary to this Act as to his employment, opportunity for employment or conditions of employment, the burden of proof that any employer or employers’ organization did not act contrary to this Act lies upon the employer or employers’ organization.”

30. The complainant alleged in his complaint and testified at the hearing that he was discharged by the Company for filing a grievance concerning unfair distribution of overtime. In his submissions before the Board, he contended that grieving an alleged violation of a collective agreement is a “right” under the Act.

31. A similar issue recently arose before the Board under the analogous provisions of *The Colleges Collective Bargaining Act* (the “C.C.B. Act”) in *The Fanshawe College of Applied Arts and Technology*, [1980] OLRB Rep. Oct. 1392. In that case it was alleged that an employee of the College had been discharged contrary to section 76 of the C.C.B. Act for initiating action under the grievance procedure of the collective agreement between the complainant trade union and the College. The respondent in that case took the position that the complaint should be dismissed because even if the grievor were to prove that his action in filing a grievance contributed to his termination, such action did not constitute the exercise of a right under the C.C.B. Act. Section 76(2)(a) of that legislation provides:

“76-(2) — The Council, an employer or any person acting on behalf of an employer shall not,

- (a) refuse to employ or to continue to employ or discriminate against a person with regard to employment or any term or condition of employment because the person is exercising any right under this Act or is or is not a member of an employee organization;”

It is evident that section 76(2)(a) is substantially similar in all material respects to section 66(a) of the *Labour Relations Act*. Moreover, section 66 of the *C.C.B. Act*, which provides that “[e]very person is free to join an employee organization of his own choice and to participate in its lawful activities”, is virtually identical to section 3 of the *Labour Relations Act*, which provides:

“3. Every person is free to join a trade union of his own choice and to participate in its lawful activities.”

The Board held in the *Fanshawe College* case that “the right to ensure compliance with a collective agreement under procedures [such as the grievance procedure contained in the applicable collective agreement] is a fundamental ‘lawful activity’ of a trade union within the meaning of section 66 [of the *C.C.B. Act*] . . .” and, therefore, ruled “that the allegations of the complainant, if proven, would constitute a violation of section 76(2)(a) of *The Colleges Collective Bargaining Act*.” The Board is similarly of the view that filing a grievance, or causing a grievance to be filed, is a fundamental “lawful activity” of a trade union in which a person such as the complainant herein is free to participate by virtue of section 3 of the *Labour Relations Act*. We are further of the view that the refusal by an employer to continue to employ a person for engaging in such activity constitutes a breach of section 66(a) of the Act.

32. Since the discharge that forms the basis of the alleged breach of section 66(a) is the same discharge that is the subject matter of the grievance dated September 23, 1981 (as set forth above), it is appropriate for the Board to consider whether it ought to defer to arbitration rather than adjudicate the complaint in the present proceedings.

33. The procedure which the Board has generally adopted in dealing with cases that allege a breach of section 68 is summarized in the following passage from *Massey-Ferguson Industries Limited and Massey Ferguson Limited*, [1977] OLRB Rep. Apr. 216, at paragraph 22:

“Where the Board determines that a trade union has violated its statutory duty of fair representation by failing to take an employee’s grievance to arbitration, and where it further determines that arbitration is the appropriate remedy in the circumstances, . . . the Board will exercise its remedial authority under section 79 of the Act to make an order directing the union to arbitrate the grievance with whatever modifications of the collective agreement appear necessary to ensure that a fair and expeditious arbitration on the merits of the grievance takes place. If the union’s denial of fair representation has aggravated the complainant’s financial loss, the Board will also at that time, make an order for damages, apportioning liability as between the trade union and the employer in the event that the grievance succeeds at arbitration, together with whatever further orders that contingent order for damages may necessitate.”

As noted in that case, the procedure is designed to avoid unduly protracted section 68 hearings and the need for the employer to come forward with evidence to defend its actions in respect of the alleged contractual violation before a violation of section 68 has been made out. It has been the Board's experience that the procedure in question has functioned effectively. Accordingly, the Board does not intend to deviate from it in section 89 complaints based upon alleged violations of section 68. However, the allegations in the present complaint are not confined to section 68; the complainant also alleges that the respondent Company breached section 66(a) of the Act by discharging him for filing a grievance, a complaint that is within the purview of the Board's unfair labour practice proceedings. Nevertheless, since the discharge to which the section 66(a) allegation pertains has also been made the subject of one of the grievances to which the section 68 allegations pertain, it is necessary for the Board to determine if adjudication by the Board under section 89 of the Act, or deferral to arbitration, is the appropriate response to this hybrid complaint.

34. The labour relations policy considerations which underlie the "discretionary balance" on deferral questions are discussed in depth in *Valdi Inc.*, [1980] OLRB Rep. Aug. 1254:

"DEFERRAL TO ARBITRATION"

4. The issue of whether or not the Board should defer to grievance arbitration arises when an alternative remedy exists under a collective agreement which is available to the grievor or complainant. Although the complainant has chosen to seek its remedy before the Ontario Labour Relations Board, the Board has a discretion under section 79 to refuse to inquire into a complaint and the existence of an equivalent remedy under a collective agreement has, in the past, been a basis on which the Board's discretion has been exercised. In other words, the Board is not obligated to inquire into every complaint brought under section 79 and its refusal to so inquire cannot, therefore, be characterized as an improper refusal to exercise its jurisdiction. See *Regina v. Ontario Labour Relations Board ex parte T.R.W. Electric Components Ltd.* (1969), 9 D.L.R. (3d) 669. On the other hand, it is the Ontario Labour Relations Board that is charged with the responsibility for administering *The Labour Relations Act* and the important rights it confers on employers and employees. This responsibility is a public duty and a policy of deferral to a more private process where the adjudicators are paid and selected by the parties to a collective bargaining agreement must find its justification within the four corners of *The Labour Relations Act* to be consistent with that public interest. To many, this justification is not readily apparent. See Bilkin, *Are Arbitrators Qualified to Decide Unfair Labor Practice Cases?* (1973), 24 Lab. L.J. 818; Simon-Rose, *Deferral Under Collyer by the NLRB of Section 8(a)(3) Cases* (1976), 27 Lab. L. J. 201; Newman, *NLRB Deferral to Arbitration in Unfair Labor Practices* (1973), 26 N.Y.U. Conf. on Lab. 37; and Comment, *Deferral to Labor Arbitration* (1975), 27 Hastings L. J. 403. Why, it can be asked, should the Board ever defer to a private arbitration where a question concerning the application of *The Labour Relations Act* arises? Arbitrators are expert on the language of collective agreements and do not, as a group, have the expertise in

labour board statutory issues that the Board has necessarily acquired through a long, intimate and specialized experience with its statute. The involvement of arbitrators in statutory issues may well result in a lack of uniformity over the meaning of important provisions of *The Labour Relations Act* or encourage direct judicial construction of an extrinsic statute on an application for judicial review. See *McLeod v. Egan*, [1975] 1 S.C.R. 517. In contrast, the Ontario Labour Relations Board is an ongoing administrative agency whose jurisdiction is provided for in the context of a privative clause. It, therefore, is able to achieve a uniform interpretation of the statutory provisions it considers. Indeed, the Board's experience in such matters provides the very justification for the statute's privative clause. There is also the possibility that the deferral of tough statutory questions to grievance arbitration will encourage lengthy, costly, complicated and legalistic hearings in that forum. This result would undermine the very features of grievance arbitration that underlie the policy of *The Labour Relations Act* requiring its insertion in every collective bargaining agreement. In fact, today, in contrast to Ontario Labour Relations Board proceedings, there is considerable doubt that grievance arbitration is sufficiently expeditious and inexpensive. Finally, there may be important procedural and remedial differences between the Ontario Labour Relations Board and grievance arbitration in any particular case and, where this may be the case, a deferral to grievance arbitration could deprive a complainant of important statutory rights. For example, if a matter did not involve discipline or discharge, a complainant would not have the benefit in grievance arbitration of the reverse legal onus provided for under section 79 of *The Labour Relations Act* nor would he have access to the Board's expansive remedial powers provided for by this same section. Surely these factors are relevant to any decision by this Board to defer to another forum. And, it is against these considerations that some might ask the more fundamental question of what business does the Ontario Labour Relations Board have in the "sub-contracting" of any public authority to private tribunals?

5. The answer to this question depends upon the fact that the statute creating the Labour Relations Board is the same statute that requires grievance arbitration of all disputes over the interpretation, application and administration of a collective agreement. On a review of *The Labour Relations Act*, it is difficult to conclude that grievance arbitration is simply a private process and that it is any less important than the Ontario Labour Relations Board in fostering industrial peace and facilitating co-operation between employees and employers. See Weiler, *Reconcilable Differences, New Directions in Canadian Labour Law*, (1980), chapter 3. Viewed in this light, a policy aimed at integrating their responsibilities and dealing with concurrent jurisdiction problems is not as troublesome as it is in those situations where grievance arbitration shoulders a responsibility under a different or extrinsic statute. For example, in the latter situation the United States Supreme Court has said there should be a trial *de novo* under Title VII of the *Civil Rights Act of 1964* even though the precise issue of racial discrimination has been submitted to final and

binding grievance arbitration. See *Alexander v. Gardiner-Denver* (1974), 415 U.S. 36. But see also the NLRB's distinction in *Electronic Reproduction Service Corp.* (1974), 87 LRRM 1211 at 1218. Some perspective can be gained on the issue by looking at it from grievance arbitration's viewpoint and asking whether the express statutory policy of encouraging the practice and procedure of collective bargaining would be effectuated if this Board was to police all collective agreements to decide if disputes over the meaning of these documents also constituted a violation of *The Labour Relations Act*? We think not. Moreover, the complete absence of a deferral doctrine means that parties would face the prospect of incurring the expenditure of time, money and their patience in two proceedings — a prospect unlikely to contribute to a healthy collective bargaining relationship. In addition, there is no longer any doubt that labour arbitrators have the jurisdiction and duty to consider public statutes that bear on the questions brought before them (unless the statute specifically provides otherwise) and there is considerable evidence that the arbitrators active in Ontario are not strangers to the provisions of *The Labour Relations Act* and the underlying policies. See *McLeod v. Egan*, *supra*, and, for example, arbitration cases considering whether a collective agreement exists in light of the provisions of *The Labour Relations Act*. *Automatic Screw Machine Co., Automotive Hardware Ltd.* (1970), 21 L.A.C. 255 (Shime); *Loblaw Groceries Co. Ltd.* (1972), 24 L.A.C. 369 (Shime). But see *Canada Labour Code* R.S.C. 1970 c. L-1 as amended, s. 54. Grievance arbitration is an institution centered on achieving industrial self-government and has played a vital role in reducing industrial strife. See Arthurs, 'Developing Industrial Citizenship: A Challenge for Canada's Second Century' (1967), 45 Can. Bar Rev. 786; Cox, 'Reflections on Labor Arbitration' (1959), 72 Harv L. Rev. 1482; Adams, 'Grievance Arbitration and Judicial Review in North America' (1971), 9 Osgoode Hall L. J. 443; Weiler, 'The Role of the Labor Arbitrator: Alternate Versions' (1969), 19 U. Tor. L. J. 16. Moreover, recent legislative change has sought to insure that arbitration remains a relatively inexpensive and expeditious process and the courts now evidence a willingness to defer to arbitral decisions save in the most exceptional circumstances. See *The Labour Relations Amendment Act*, 1979, S. O. 1979, c. 32. And see generally: *Douglas Aircraft Co. of Canada Ltd. v. McConnell et al.* (1979), 99 D.L.R. (3d) 385 (S.C.C.); *Heustis v. New Brunswick Electric Power Commission* (1979), 98 D.L.R. (3d) 622 (S.C.C.); *Association of Radio & Television Employees of Canada (CUPE-CLC) v. Canadian Broadcasting Ltd.* (1973), 40 D.L.R. (3d) 1 (S.C.C.); *Bell Canada v. Office and Professional Employees International Union, Local 131* (1973), 37 D.L.R. (3d) 561 (S.C.C.). When deferral is looked at in this light, it becomes less self-evident that a policy of giving full play to a process of dispute resolution manned and administered by the parties is inconsistent with the Board's broad statutory mandate aimed at encouraging the practice and procedure of collective bargaining. This is particularly the case if the Board's mandate is viewed not so much in terms of a proprietary interest in its unfair labour practice jurisdiction, but rather in the realization that the purpose of that jurisdic-

tion is to contribute to labour relations stability and harmony. Accordingly, the arguments for and against a policy of deferral to grievance arbitration rely upon significant but conflicting values and this conflict in values, unsurprisingly — has established a ‘discretionary balance’ on deferral questions. The Board will defer but deferral, either before or after arbitration is in no way automatic.”

As noted in *Valdi*, the Board generally defers to arbitration when the resolution of the contractual issue is congruent with the resolution of the statutory unfair labour practice issue, since in such circumstances, the Board “is able to take the view that the matter is primarily a contractual or factual difference between the parties.” However, the Board has been unwilling to defer to arbitration where key provisions of the *Labour Relations Act* require elaboration and application, where the respondent’s conduct constitutes a total repudiation of the collective bargaining process, where arbitration may be unavailable to the complainant and where arbitral remedies may be inadequate.

35. Having regard to all of the circumstances, the Board is of the view that this is an appropriate case in which to defer to arbitration (under section 124 of the Act) the question of the propriety of the complainant’s discharge. The traditional remedies granted by arbitrators to redress an employee who has been discharged without just cause appear to be quite adequate in this case; a “posting order” would be of little or no benefit to the bargaining unit employees who may have been collaterally affected by the alleged unfair labour practice since the project in question has ceased to exist. Thus, the employees who may have been aware of the complainant’s discharge will have either ceased to be employed by the Company or been transferred to other projects. Moreover, one of the bases upon which the complainant challenges his discharge, namely, that the discharge is invalid because the complainant was not dismissed “during his working hours” as required by Article 9(f) of the Collective Agreement, is clearly a matter of contractual interpretation and not a matter that can be properly considered by the Board under section 89 of the Act, in deciding an unfair labour practice complaint founded upon section 66(a) of the Act. Although the violation of the Act which the Company is alleged to have committed is a serious matter, it does not constitute a total repudiation of the collective bargaining process. Any need which may have existed for elaboration of the applicability of section 66(a) to an employee who utilizes the grievance procedure contained in a collective agreement has been at least partially satisfied by the discussion of that issue contained in this decision and in the Board’s decision in the *Fanshawe College* case (*supra*). The absence of any evidence and submissions on behalf of the respondent Company concerning the circumstances surrounding the discharge has left the Board without any means to realistically assess the propriety of the Company’s actions. If the Board were to assert jurisdiction over this aspect of the complaint, it would be forced to decide the case against the respondent Company not on the basis of cogent and compelling evidence, but rather on the basis of section 89(5) of the Act by which a charge such as the one made by the complainant against the Company in respect of his discharge must be taken as proved when an employer against whom such allegation is made under section 89 of the Act fails to adduce any evidence to rebut the charge against it (see *Windsor Airline Limousine Services Limited*, [1980] OLRB Rep. Feb. 272, at paragraph 71; and *I.C.B. Warehousing Division of Alar-Anson*, [1976] OLRB Rep. Oct. 621). Although an employer who elects not to appear before the Board to answer such a complaint generally does so at its own peril, the Board’s general practice (in section 89 complaints involving allegations under section 68) of declining to arbitrate a discharge or other grievance so as to obviate the need for an employer to present

before the Board its full defence to the grievance, raises some doubt concerning the fairness of strictly applying that approach in the present case. Although as noted in *Valdi Inc. (supra)*, at paragraph 12) there is some question whether an arbitrator selected by or imposed upon the parties would unhesitatingly apply “the taint” theory that provides the basis of the Board’s approach to situations in which an employee’s union activity was but one reason of many for the employees’ dismissal (see *Westinghouse Canada Ltd.*, [1980] OLRB Rep. Apr. 577; *Barrie Examiner*, [1975] OLRB Rep. Oct. 745; and *Fielding Lumber*, [1975] OLRB Rep. Sept. 665), the possibility of a different approach being applied to the adjudication of the complainant’s discharge grievance can be minimized by directing that the grievance be referred to the Board for final and binding determination under section 124 of the Act, which, in any event, provides a more expeditious and less costly forum than the arbitration procedures contained in the Collective Agreement.

36. The determination of an appropriate remedy in this case has presented the Board with some difficulty. As noted in *Massey Ferguson (supra)*, section 68 does not confer upon a successful complainant an automatic right to have his grievance arbitrated; where a union fails to take a grievance to arbitration and it is not obvious that arbitration is necessary, the Board may direct the union to reprocess the grievance from the point at which fair representation was denied. However, it appears from the evidence before us in the present case that the complainant has been repeatedly denied proper representation by the Union’s perfunctory treatment of his legitimate concerns, beginning with the initial refusal to file an overtime grievance on behalf of the complainant and continuing to the Union’s arbitrary treatment of his grievors at the third step of the grievance procedure, which step was itself only resorted to under the assurance of this complaint.

37. Having regard to all of the circumstances, the Board has reluctantly concluded that a Board order that the Union reprocess the complainant’s grievances and give due consideration to the desirability of referring them to arbitration would not likely provide the complainant with an effective remedy. The Union’s apparent view that the complainant’s grievances are not worthy of serious consideration has solidified over the past twelve months. Moreover, there is nothing in the evidence that suggests that the Company would be willing to re-evaluate or modify its consistent denial of the grievances. Thus, the prejudice of further delays that would be occasioned by remitting the grievances into the ordinary stream of the grievance procedure contained in the Collective Agreement would not be counter-balanced by the prospect of settlement of the grievances short of arbitration. Thus, the Board is of the view that a remedy analogous to that awarded by the Board in *Leonard Murphy*, [1977] OLRB Rep. March 146, is appropriate in the circumstances of this case. In that case the Board directed the union and the employer to forthwith arbitrate certain grievances notwithstanding the provisions of the applicable collective agreement. It also ordered the union to engage counsel, jointly chosen by the grievors and the union, to represent the union in the arbitration of the grievances in question, and made a contingent award of damages against the union, in recognition of the fact that “it is only in the event that the grievances are ultimately successful at arbitration that the grievors will have suffered financially from the union’s violation” of section 68 (see also *Consumers Glass Company Limited*, [1979] OLRB Rep. Sept. 861, and *The Corporation of the Township of Hastings*, [1979] OLRB Rep. Nov. 1072).

38. Since the respondent Union’s arbitrary representation of the complainant has resulted in grievances being filed that do not fully and properly reflect Mr. Fortin’s complaints against the Company, the order will direct that the grievances be duly amended with the

assistance of counsel and refiled with the Company as amended, notwithstanding the provisions of the Collective Agreement. If the parties are unable to resolve the amended grievances in a manner that is satisfactory to the complainant, then the Union is to refer the amended grievances to the Board for final and binding determination under section 124 of the Act.

39. The Board therefore orders, notwithstanding the provisions of any collective agreement binding upon the parties hereto,

- (i) that the respondent Union forthwith engage counsel, jointly chosen by the respondent Union and the complainant, to revise the complainant's overtime grievance dated August 12, 1980 and the complainant's discharge grievance dated September 23, 1980, so as to properly and fully reflect the complainant's allegations and concerns;
- (ii) that the respondent Union forthwith deliver the amended grievances to the respondent Company;
- (iii) that unless within seven days after delivery to the respondent Company the amended grievances are settled in writing in a manner that is satisfactory to the complainant, the respondent Union and the respondent Company, the respondent Union shall cause the aforementioned counsel to refer the amended grievances to the Board for final and binding determination under section 124 of the *Labour Relations Act* and shall continue to engage the aforementioned counsel to represent the respondent Union in the section 124 proceedings;
- (iv) that the respondent Union post forthwith copies of the attached notice marked "Appendix", duly signed by a representative of the respondent Union, in conspicuous places at its place of business in Sudbury, Ontario; keep the notices posted for 60 consecutive working days; and take reasonable steps to insure that the said notices are not altered, defaced or covered by any other material;
- (v) that the respondent Union, at its own expense, mail a copy of the attached notice marked "Appendix", duly signed by a representative of the respondent Union, to all bargaining unit employees represented by the respondent Union.

40. In the event that a settlement by the parties hereto or a determination by the Board under section 112a determines that compensation is due to the complainant, this Board will remain seized of this complaint and will entertain representations with respect to the amount of compensation, if any, which is to be borne by the respondent Union. The Board will also remain seized of this complaint to resolve any matter arising out of the interpretation of its order.

DECISION OF BOARD MEMBER C. A. BALLENTINE;

1. I concur in the decision of the Board, however, I do have a reluctance in not finding that the Company has violated section 66(a) of the Act.

2. The concern I have is that both Mr. Stewart, the Business Agent of Local 1425, and the Company treated Mr. Fortin's complaint to the Board with contempt by not appearing at the hearing. It is my belief that they considered the grievance to have been finalized at the "Step Three" Labour Management Relations Committee meeting held on April 28, 1981. They chose not to attend before the Board at their own peril, and the respondent Union has suffered the consequences.

3. A union in the construction industry should be aware that if a grievor is not satisfied after the grievance steps of the Collective Agreement have been exhausted, section 124 of the Act is still available to the union as an expeditious forum for adjudication of the grievance. In view of the serious consequences of a dismissal from employment, a union must give earnest consideration to referring a discharge grievance to the Board for final and binding determination under section 124 which provides, in part, as follows:

"(1) Notwithstanding the grievance and arbitration provisions in a collective agreement or deemed to be included in a collective agreement under section 44, a party to a collective agreement between an employer or employers' organization and a trade union or council of trade unions may refer a grievance concerning the interpretation, application, administration or alleged violation of the agreement, including any question as to whether a matter is arbitrable, to the Board for final and binding determination.

(2) A referral under subsection 1 may be made in writing in the prescribed form by a party at any time after delivery of the written grievance to the other party, and the Board shall appoint a date for and hold a hearing within fourteen days after receipt of the referral and may appoint a labour relations officer to confer with the parties and endeavour to effect a settlement before the hearing."

4. Although I am concerned that the respondent Company, which chose not to appear before this Board to answer the complaint against it, has not been found to be in violation of the Act at this stage, I accept the rationale of the decision in directing the Union to pursue the grievance of Mr. Fortin as prescribed by the order of the Board.

The Labour Relations Act

NOTICE TO EMPLOYEES**Posted by Order of the Ontario Labour Relations Board**

WE, MILLWRIGHT LOCAL 1425, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, HAVE ISSUED THIS NOTICE IN COMPLIANCE WITH AN ORDER OF THE ONTARIO LABOUR RELATIONS BOARD ISSUED AFTER A HEARING IN WHICH WE PARTICIPATED. THE ONTARIO LABOUR RELATIONS BOARD FOUND THAT WE VIOLATED THE LABOUR RELATIONS ACT AND HAS ORDERED US TO INFORM ALL EMPLOYEES IN THE BARGAINING UNIT OF THEIR RIGHTS.

THE ACT GIVES INDIVIDUAL EMPLOYEES THESE RIGHTS:

TO BE REPRESENTED BY A TRADE UNION AND TO PARTICIPATE IN ITS LAWFUL ACTIVITIES.

TO BE REPRESENTED BY A TRADE UNION IN A WAY THAT IS NOT ARBITRARY, DISCRIMINATORY OR IN BAD FAITH, WHETHER OR NOT THEY ARE MEMBERS OF THAT TRADE UNION.

WE ASSURE ALL EMPLOYEES REPRESENTED BY MILLWRIGHT LOCAL 1425, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA THAT:

WE WILL NOT DO ANYTHING THAT INTERFERES WITH THESE RIGHTS.

WE WILL NOT ENGAGE IN ANY CONDUCT THAT IS ARBITRARY, DISCRIMINATORY OR IN BAD FAITH IN THE REPRESENTATION OF ANY MEMBER OR EMPLOYEE.

WE WILL COMPLY WITH ALL ORDERS OF THE ONTARIO LABOUR RELATIONS BOARD.

WE WILL FORTHWITH ENGAGE COUNSEL, JOINTLY CHOSEN BY MILLWRIGHT LOCAL 1425 AND MARCEL FORTIN, TO REVISE MR. FORTIN'S OVERTIME GRIEVANCE DATED AUGUST 12, 1980, AND DISCHARGE GRIEVANCE DATED SEPTEMBER 23, 1980, SO AS TO PROPERLY AND FULLY REFLECT MR. FORTIN'S ALLEGATIONS AND CONCERNS, AND WILL FORTHWITH DELIVER THE AMENDED GRIEVANCES TO BEDARD GIRARD ONTARIO, DIVISION OF B G CHECO INTERNATIONAL LIMITED. UNLESS WITHIN SEVEN DAYS AFTER DELIVERY TO THE COMPANY THE AMENDED GRIEVANCES ARE SETTLED IN WRITING IN A MANNER THAT IS SATISFACTORY TO MR. FORTIN, MILLWRIGHT LOCAL 1425 AND THE COMPANY, WE WILL CAUSE THE AFOREMENTIONED COUNSEL TO REFER THE AMENDED GRIEVANCES TO THE ONTARIO LABOUR RELATIONS BOARD FOR FINAL AND BINDING DETERMINATION UNDER SECTION 112A OF THE LABOUR RELATIONS ACT AND WILL CONTINUE TO ENGAGE THE AFOREMENTIONED COUNSEL TO REPRESENT MILLWRIGHT LOCAL 1425 IN THE SECTION 112A PROCEEDINGS.

WE WILL PAY SUCH COMPENSATION TO MR. FORTIN AS MAY BE ORDERED BY THE ONTARIO LABOUR RELATIONS BOARD.

MILLWRIGHT LOCAL 1425, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA.

PER: _____

OCTOBER 2, 1981

This is an official notice of the Board and must not be removed or defaced.

This notice must remain posted for 60 consecutive working days.

1317-81-U Davidson — Walker Funeral Homes, Applicant, v. Retail Commercial and Industrial Union, Local 206, chartered by the United Food & Commercial Workers' International Union, Respondent

Sale of Business – Strike – Business sold during lawful strike – Whether right to strike suspended until conditions precedent exhausted with new employer – Whether strike may lawfully continue after sale – Whether Board exercising discretion to make unlawful strike declaration

BEFORE: M. G. Picher, Vice-Chairman, and Board Members C. G. Bourne and W. F. Rutherford.

APPEARANCES: *Philip J. Wolfenden and Michael Walker for the applicant; Reva Devins, Charles McCormick and Jack Colvin for the respondent.*

DECISION OF M. G. PICHER, VICE-CHAIRMAN, AND BOARD MEMBER C. C. BOURNE; October 14, 1981

1. This is an application for a direction under section 92 of the *Labour Relations Act*. The applicant, Davidson — Walker Funeral Homes, alleges that because there has been the sale of a business within the meaning of section 63 of the Act a strike which was being lawfully conducted against its predecessor before the sale cannot be lawfully continued. The case raises, apparently for the first time, the issue of whether under the *Labour Relations Act* the sale of a business has effect of suspending a union's right to strike until conciliation and all other conditions precedent to a strike have been exhausted with the new employer.

2. The facts are not in dispute. On August 19, 1980 the respondent union was certified as exclusive bargaining agent of the employees of Davidson Funeral Homes at its locations in Port Colborne, Welland and Fort Erie. Negotiations for a first collective agreement proceeded through all of the necessary steps under the Act and on June 1, 1981 the union commenced a lawful strike at all three funeral chapels. On August 1, 1981 the Welland location of Davidson Funeral Homes was purchased by Mr. Michael Walker who since that date has carried on business thereunder the name Davidson — Walker Funeral Homes. It is common ground that the transaction was a sale of part of a business within the meaning of section 63 of the Act. While for business reasons the name "Davidson" still appears as part of the name of the funeral home, there is no corporate or business relationship between the vendor and the purchaser of the business.

3. At the time of the sale the Welland chapel employed one funeral director, Jack Schoenfeldt. He was the sole employee at that location and was represented by the union as part of the bargaining unit spanning the three locations. On July 31, 1981, having learned of the sale of the Welland home the union wired the following message to the purchaser through its solicitor in Welland:

We are certified trade union for the employees of Davidson Funeral Homes in Welland, Port Colborne and Fort Erie. We are given to understand that your client mister Mike Walker has purchased the Welland Funeral Home from Davidson and intends to operate a funeral business out of the location commencing August 1, 1981. Kindly advise if your client is prepared to meet with the union to finalize a collective

agreement between your client and our union on behalf of the bargaining unit employees of the Welland operation specifically Jack Schoenfeldt and further advise if your client is prepared to recall Jack Schoenfeldt to employment as a funeral director on a full time basis. Your immediate response to this message is expected.

Jack Colvin, Secretary Treasurer, Retail Commercial and Industrial Union, Local 206.

4. In a telegram to the union dated August 4, 1981, the applicant confirmed the transaction in the following terms:

Effective August first 1981 the Welland Chapel of the Davidson Funeral Home Ltd. has been purchased by Mr. T. Michael Walker.

5. The applicant did not, however, indicate a time at which it would meet. Rather, in a further telegram sent on the same date through its solicitor it advised the union that Mr. Walker himself would be the only funeral director at that location. Its second telegram was as follows:

Walker has purchased business August first will operate business himself and wont require any qualified assistance. When business warrants additonal help will discuss same with your union. Severance pay or other arrangements for Schenfeldt remain responsibility of Davidson.

6. Thereafter the union continued to strike the Welland Chapel and to maintain a picket line, to the apparent detriment of the applicant's business. On September 15, 1981 Davidson — Walker filed this application. For the purposes of this application it does not dispute the employment status of Mr. Schoenfeldt. It agrees with the union that there has been a sale, that Schoenfeldt is an employee and that the union continues to be his lawful bargaining agent. It maintains, however, that the union is not entitled to prosecute a strike against the purchaser of a business until the conditions in the Act are met and that in this case those conditions have not been met. On that basis it submits that after August 1, 1981 the strike as against Davidson — Walker has been unlawful. The employer requests extensive relief including a declaration that the strike is unlawful, a cease and desist order in relation to both the strike and the picketing as well as an order requiring the union to give notice to the public that it is not on strike against the Davidson — Walker Funeral Home.

7. The union submits that its bargaining rights, including its right to strike, are protected by section 63 of the Act. It argues that in this case it has exercised those rights and has exhausted all of the statutory pre-conditions to a strike under the Act. It maintains that it is therefore entitled to continue its ongoing strike against the predecessor employer as a lawful and timely strike against the purchaser of the business.

8. The resolution of this complaint turns on the interpretation of section 63 of the Act. It provides, in part as follows:

63.(1) In this section,

(2) Where an employer who is bound by or is a party to a collective

agreement with a trade union or council of trade unions sells his business, the person to whom the business has been sold is, until the Board otherwise declares, bound by the collective agreement as if he had been a party thereto and, where an employer sells his business while an application for certification or termination of bargaining rights to which he is a party is before the Board, the person to whom the business has been sold is, until the Board otherwise declares, the employer for the purposes of the application as if he were named as the employer in the application. the application.

- (3) Where an employer on behalf of whose employees a trade union or council of trade unions, as the case may be, has been certified as bargaining agent or has given or is entitled to give notice under section 14 or 53, sells his business, the trade union, or council of trade unions continues, until the Board otherwise declares, to be the bargaining agent for the employees of the person to whom the business was sold in the like bargaining unit in that business, and the trade union or council of trade unions is entitled to give to the person to whom the business was sold a written notice of its desire to bargain with a view to making a collective agreement or the renewal, with or without modifications, of the agreement then in operation and such notice has the same effect as a notice under section 14 or 53, as the case requires.
- (10) For the purposes of sections 5, 57, 59, 61 and 123, a notice given by a trade union or council of trade unions under subsection (3) or a declaration made by the Board under subsection (6) has the same effect as a certification under section 7.

9. Section 63 as it now stands has evolved through several amendments of the Act. A review of the history of the section is helpful to a better understanding of the rights and duties which it confers on unions and employers respectively.

10. Prior to the enactment of successorship legislation, the bargaining rights of a trade union terminated upon the sale or disposition of a business. The common law afforded no protection to established collective bargaining rights when the employer's legal identity was altered. As concluded in earlier cases such as *Brantford Produce Company Ltd.* 61 CLLC ¶16,193, unless the parties to the employment relationship were contractually bound or the union had been certified for that specific employer's business, the Board could not enforce collective bargaining. A mere change in the legal ownership of the business was therefore fatal to the trade union's representation rights.

11. In the 1962 Ontario Royal Commission's *Report on Labour — Management Relations in the Construction Industry*, (the Goldenberg Report), the need for statutory protection of a trade union's bargaining rights upon a transfer of ownership was seen as essential to orderly industrial relations. At p. 114 of its report, the Commission suggested:

- i. The Act should provide that where a business or part thereof is sold,

leased or transferred, the purchaser, lessee or transferee shall be bound by all the proceedings before the date of sale, and shall become ipso facto a party thereto, and that the proceedings shall continue as if no such change has occurred, and that if a bargaining agent was certified the certification shall remain in effect, and if a collective agreement was in force that agreement shall continue to bind the purchaser, lessee or transferee to the same extent as if it had been signed by him.

- ii. Consideration should be given to measures for the protection of acquired bargaining rights in situations arising from certain types of business practices which may affect such rights, for example, where a contractor, engaged on a number of projects in each of which he has a different partner, is in a position to shift employees from a project with respect to which certification has been granted to another.

12. In response to this concern the Legislature enacted successor rights legislation in the form of the *Labour Relations Amendment Act*, S.O. 1962-63, c. 70, s. 47(a), which provided:

47a.-(1) In this section,

- (a) 'business' includes a part of parts thereof;
- (b) 'sells' includes leases, transfers and any other manner of disposition, and 'sold' and 'sale' having corresponding meanings.
- (2) Where an employer who is bound by or is a party to a collective agreement with a trade union or on behalf of whose employees a trade union has been certified as bargaining agent or has given or is entitled to give notice under section 11 or 40 sells his business, the trade union continues, until the Board otherwise directs, to be the bargaining agent for the employees of the person to whom the business was sold in the like bargaining unit in that business, and the trade union is entitled to give to the person to whom the business was sold a written notice of its desire to bargain with a view to making a collective agreement, and such notice has the same effect as a notice under section 11.

13. It should be noted that the Legislature's first intention, reflected in *The Labour Relations Amendment Act*, S.O. 1961-62 c. 28, was to enact a provision similar to the present section 63, including the "flow through" of any collective agreement in effect at the time of the sale of a business. However that amendment was not proclaimed in force and the more limited rights described above were enacted instead. It is clear from these tentative and incremental legislative steps that in its first proclaimed version section 63(2) (then section 47a(2)) was intended only to preserve the bargaining rights of the trade union on the sale of a business. The union then gained the advantage of not being required to reorganize and obtain certification in respect of the like bargaining unit in the business of the new employer. The limited right which the union had, however, was to give notice to bargain to the new employer, who in turn must

recognize its right to act as exclusive bargaining agent, as though it had been certified. It is clear that in enacting that legislation the Legislature was concerned only with protecting the union's bargaining rights. To the extent that a collective agreement could not survive the sale of a business, the Legislature obviously did not intend to preserve the established rights of employees, apart from the right to be represented by the same union.

14. The Legislature did not, in other words, adopt the broader Goldenberg recommendation that when a business is transferred the purchaser of the business should be "bound by all of the proceedings before the date of sale". As noted in *Aircraft Metal Specialists Ltd.*, [1970] OLRB Rep. Sept. 702 the purpose of section 47a was twofold:

To prevent the subversion of bargain-rights by transactions which are designed to get rid of the union. We have encountered situations where there are transactions between various corporate entities which are in effect 'paper transactions', and are a form of corporate charade engaged in for the purpose of eliminating the trade union. In this type of case the Board has liberally interpreted section 47(a) to preserve the bargaining rights and has attempted to look beyond 'paper transactions' to achieve that purpose.

To preserve the bargaining rights with respect to work which has accrued to the benefit of the employees as a result of their union becoming the bargaining agent through certification or voluntary recognition. Once the union had been recognized with respect of a particular business the union then obtains a right to bargain with respect to wages, hours and other conditions of employment in that business. The right to participate in the business and its functions in that manner is in the nature of a vested right and section 47(a) allows the union to pursue that bargaining right when all or part of the business is sold.

15. It is significant that the language of section 47(a)(2) as first enacted, which is the very language of the present section 63(3), did not preserve the rights of employees or their union under the Act as they stood at the time of a sale; only the right of representation was preserved. This was reflected by the following observation of the Board in *Thorco Manufacturing Ltd.*, 65 CLLC ¶ 16,053:

Section 47(a) does not operate to bind the successor of the business with the collective agreement which has been made between the union and the predecessor employer but only with the obligation to recognize the union's bargaining rights for his employees in a like bargaining unit. The new employer is therefore, left free to bargain for and to negotiate his own agreement with the union.

16. It was not until a further amendment of *The Labour Relations Act* in 1970 (*The Labour Relations Amendment Act 1970 (No. 2)*, S.O. 1970, c. 85, s. 22) that the language currently found in section 63(2) was introduced. That legislation provided for the flow through of a collective agreement that was in effect at the time of a sale.

17. The section was amended to provide, in part:

47(a)(2) Where an employer who is bound by or is a party to a collective agreement with a trade union or council of trade unions sells his business, the person to whom the business has been sold it, until the Board otherwise declares, bound by the collective agreement as if he had been a party thereto and, where an employer sells his business while an application for certification or termination of bargaining rights to which he is a party is before the Board, the person to whom the business has been sold is, until the Board otherwise declares, the employer for the purpose of the application as if he were named as the employer in the application.

(3) Where an employer on behalf of whose employees a trade union or council of trade unions, as the case may be, has been certified as bargaining agent or had given or is entitled to give notice under section 11, sells his business, the trade union or council of trade unions continues, until the Board otherwise declares, to be the bargaining agent for the employees of the person to whom the business was sold in the like bargaining unit in that business, and the trade union or council of trade unions is entitled to give to the person to whom the business was sold a written notice of its desire to bargain with a view to making a collective agreement and such notice has the same effect as a notice under section 11.

18. Under the then section 47(a)(2) (later section 55(2) and now section 63(2)) a subsisting collective agreement was protected from termination upon a sale of a business. Significantly the amended section 47(a)(3) (now section 63(3) as further amended by S.O. 1975, c. 76, s. 15(1)) adopted the very language of the earlier section 47(a)(2) to describe the rights of a union which did not have a collective agreement, but was certified and had given notice or was entitled to give notice to bargain under section 13 (now section 14). In 1975 the same language was extended to explicitly cover a union whose collective agreements had expired at the time of the sale of a business. The right of a union, whether in a first agreement negotiation or in a renewal situation, was to give the new employer notice to bargain, such notice to have the same effect as notice under section 13 (now 14) or section 45 (now 53).

19. Counsel for the union concedes that the giving of notice under section 63(3) has significant legal consequences to the extent that, in the words of the Act, it "has the same effect as a notice under section 14 or 53. . ." Notice under those sections triggers the duty to bargain and the negotiation and conciliation processes which are the preconditions to a lawful strike or lockout under the Act. More specifically, section 15 of the Act requires the parties to meet and bargain within fifteen days from the giving of the notice. The notice effectively freezes the rights and duties of the union, the employer and the employees by the operation of section 79(1) of the Act. Where the notice has been given under section 14 or 53 the Minister is required, by section 16 of the Act, to appoint a conciliation officer. By virtue of section 72(2) of the Act where no collective agreement is in operation no strike or lock out can commence until the Minister has appointed a conciliation officer and fourteen days have elapsed after a no-board report. The scheme of bargaining under the Act clearly contemplates that the giving of notice under sections 14 and 53, and by clear extension the giving of notice under section 63(3) of the Act, are required before a union can lawfully strike or an employer can lawfully impose a lockout. That is not disputed by the union in the instant case. Counsel for the union

maintains, however, that in this case the union did not give notice under section 63(3). In her view the union is therefore free to pursue the continuation of the prior right to strike which matured against the predecessor employer, Davidson Funeral Homes.

20. In other words, counsel for the union submits that section 63(3) gives the union a choice. She argues that when the sale of a business takes place during a strike the union may either continue the strike as an ongoing incident of continuing bargaining or, in the alternative, it can give notice to the employer under section 63(3), thereby ending its strike and reverting to the negotiation and conciliation process that must be pursued to the point of a no-board report before a strike can be lawfully undertaken against the new employer.

21. In our view that analysis of section 63(3) raises some fundamental problems. Firstly, bearing in mind that legislation must be presumed to have some meaning and purpose, it is difficult to see why a union should need the alternative which she describes. Mediation is generally available to willing parties when a strike is ongoing. Moreover, there is nothing under the Act to prevent a union from pursuing mediation and suspending ongoing strike for such time as it sees fit, assuming no lockout has been imposed. It is difficult to see why the Legislature would have deliberately fashioned the possibility of a second round of conciliation as a precondition to a strike at the option of the union when the union already has the capacity to suspend its strike and explore the possibility of a mediated solution to its dispute.

22. A further difficulty with the union's interpretation is the obvious inequality in bargaining that it would create. In the scheme of the Act the strike and lockout are co-relative rights. Neither party can strike or lockout until the requirements of the Act, in the form of notice, bargaining, conciliation and the lapse of time after a no-board report have been met. A significant feature of the balance of bargaining under the Act is that neither party can, except by making a collective agreement, remove the other's power to lawfully use economic sanctions once those conditions precedent have been met. As a corollary right, the choice as to the timing of a strike or lockout rests entirely in the discretion of the union and employer respectively. If the union's interpretation of section 63(3) obtains, that fundamental balance would be shifted on the sale of a business. If we were to accept the union's interpretation, the Act so construed would give to the union the unilateral right to end not only an ongoing strike by giving notice under section 63(3), but also the unilateral right to end an ongoing lockout by giving the same notice. Since the power of notice under section 63(3) is exclusively the union's, the employer could not exercise a similar right. Counsel for the union was not troubled by that anomaly. We are.

23. We cannot accept the union's construction of the rights granted by section 63(3) of the Act. Its interpretation would spawn procedures that are unnecessary and which are fundamentally counter to the scheme of bargaining generally contemplated by the Act. In effect, counsel for the union submits that section 63(3) of the Act, by continuing the union's right to bargain for the employees has, in the words of Goldenberg, continued all collective bargaining proceedings as they were before the sale. Neither the history nor the words of the section support that conclusion.

24. The limited words of section 63(3) of the Act and their piecemeal evolution stand in sharp contrast to the plain words that might have been chosen to impart the intention advanced by the union, and which have been chosen by the Legislature in a different context of successorship. Section 62 of the Act, which deals with the consequences of amalgamation or

merger by which one union may become the successor of another, is unequivocal in its terms. Where there has been a merger, amalgamation or transfer of jurisdiction the section vests in the Board the authority to declare that the successor union has "acquired the rights, privileges and duties under this Act of its predecessor" and subsection 3 of section 63 provides:

Where the Board makes an affirmative declaration under subsection (1), the successor shall for the purposes of this Act be conclusively presumed to have acquired the rights, privileges and duties of its predecessor, whether under a collective agreement or otherwise, and the employer, the successor and the employees concerned shall recognize such status in all respects.

25. The wording chosen by the Legislature to describe the rights of a union vis-a-vis the successor employer where no collective agreement is in effect are obviously more limited. The plain reading of the section leads to the conclusion that the union has what the section gives it, namely the entitlement (in our view a word indistinguishable from "right") to give notice to the new employer of its intention to bargain to make a first collective agreement or to renew and amend a previously expired collective agreement. By the inescapable words of the Act the notice so given, for the purposes set out in subsection (10) of section 63, has the same effect as certification.

26. The issue in this case relates directly to the issue before the Board in *Oxford Manor Rest Home*, [1980] OLRB Rep. Dec. 1786. In that case the Board was required to assess a union's claim that a freeze of the employee's rights under section 79 of the Act instituted by notice to bargain to the predecessor employer continued in effect against the successor employer after the sale of the business. Interpreting section 63(3) (then 55(3)) the Board determined that the freeze binding the predecessor employer, triggered by notice to it under section 14 of the Act, did not survive the transfer of the business. In other words, the rights of the union as against the prior employer as they stood under the Act at the time of the sale did not continue without interruption to bind the new employer. Any freeze of the conditions of employment binding the successor employer was found to originate entirely in the notice to bargain given to the successor employer under section 63(3) of the Act and extended only to conditions as they stood at that date. In concluding that section 63(3) does not vest in the union all ongoing proceedings and rights under the Act as against the successor employer the Board commented at p. 1788:

In essence the trade union, such as in the instant case, continues 'to be the bargaining agent for the employees of the person to whom the business was sold' and 'is entitled to give to the person to whom the business was sold a written notice of its desire to bargain with a view to making a collective agreement'. Nothing in the section explicitly puts the new employer into the shoes of the previous employer so as to make all the rights and obligations relating to the collective bargaining relationship automatically attach to the new employer. The fact that the Legislature has specifically set out that the trade union shall continue to be the bargaining agent and shall have the right to serve notice to bargain on the new employer, militates against there being any additional rights or privileges from any other notice to bargain which may have been served on the previous employer. This view

is further fortified by an examination of section 55(2) which, in dealing with a sale of business while an application for certification or termination is before the Board provides, '... person to whom the business has been sold is ... the employer for the purposes of the application as if he were named as the employer in the application.' In this latter case where the Legislature intended that the new employer should fit precisely into the shoes of the previous employer it has explicitly said so. Had the Legislature similarly intended in section 55(3) we have no doubt it would have said so.

27. It should be noted that the giving of notice to a successor employer under section 63(3) affords the union extraordinary protection to its bargaining rights — protections which are clearly beyond those available if the section were merely to continue all proceedings under the Act as they stand at the time a business is sold. In a recent decision the Board had occasion to explore the benefit to a union conferred by sections 63(3) and (10). In *Vaunclair Meats Limited*, [1981] OLRB Rep. Aug. 1186 the Board found that the giving of notice by a union under section 63(3) (then 55(3)) has the effect of sheltering a union for at least one year from applications for the termination of its bargaining rights or from raids by another union. When a union gives notice under the section that would otherwise be the open period in which the union is vulnerable to termination or displacement is effectively closed. In dismissing the application for termination brought by an employee in that case the Board commented:

Where a business has changed hands the possibility of greater stress on a union is real; it can no longer be sure that it will bargain with the same expectations along the paths that it travelled time and again with the predecessor employer. In this sense a union bargaining with a successor employer after the transfer of a business is in a situation similar to a union bargaining a first collective agreement after certification. By enacting section 55(10) of the Act the Legislature has recognized that reality and provided the union faced with a first negotiation with a successor employer the same protection of its bargaining rights as would operate to protect the negotiation of a first collective agreement. Like a newly certified union, a union dealing with a successor employer can proceed with the assurance that its bargaining rights cannot be subject to attack for a minimum of one year. That is the unequivocal effect of section 49(1) of the Act and it is the clearly intended consequence of section 55(10) of the Act.

28. There are compelling reasons for qualifying the rights of unions and employers by postponing the right to strike or lock out on the sale of a business. By the present operation of article 63(3) an employer who purchases a business during a strike is given at a minimum the opportunity to advance his own proposals and attempt to make a collective agreement in an atmosphere free of the inevitable tension of a strike or lockout. The industrial dispute will, after all, generally not be of his own making. The new employer may well bring to the bargaining table a substantially different point of view, shaped by such various factors as his own production and marketing strategies, his employment policies or collective agreements in other plants, his general objectives for the business, and an economic well being that may differ substantially from his predecessor's. In many respects he may display a more positive

face with more positive results. The view, implicit in the Act, therefore, is that at the moment of the sale the successor employer should be given a fair opportunity to bargain initially in an atmosphere devoid of the stress caused by a lockout or strike. Moreover, the opportunity so given to the new employer is not prejudicial to the union in any terminal sense. The right to strike the new employer is not removed; it is only postponed for the time which the Act allows for any two parties to avail themselves of the statutory mechanisms designed to assist them to reach an accommodation. In our view that result is more consistent with the scheme of the Act. It is, moreover, the only conclusion supportable on the words of section 63 viewed in the overall context of the statute.

29. The Board is mindful of the practical difficulty that a union might face in some instances where the precise timing of a sale or indeed the conclusion that a sale of a business has occurred is less than clear. The Act itself makes express allowance for a certain amount of uncertainty over whether there has been a sale when an application for a declaration to that effect is pending before the Board, and it suspends liability accordingly. Section 63(9) for example, exempts an employer from the obligation to bargain until the rights of the parties have been clarified by the decision of the Board in an application pending under section 63.

30. Usually, as in this case, an arm's length transaction constituting the sale of a business is easily identified. Sometimes, however, the issue of whether there has been a sale of business within the meaning of section 63 of the Act may be a close and contentious question whose answer will only emerge after extensive discussions between the parties or after litigation of a section 63 application. Where the Board is satisfied that a union has continued a strike after the effective date of a sale, but has done so on the strength of a belief held in good faith and on reasonable grounds that no sale within the meaning of the Act in fact occurred, the Board may exercise its discretion not to grant an unlawful strike declaration in respect of such time as the union did not know or could not reasonably be expected to know that a sale of the business within the meaning of the Act had in fact transpired. The same considerations would apply to an application for a declaration that an employer has unlawfully continued a lockout after the transfer of a business.

31. In this case the parties addressed considerable argument to whether the union's telegram of July 31, 1981 constituted written notice to bargain to the successor employer within the meaning of section 63(3). We are satisfied that it does. Substance must prevail over form if the Act is to be realistically applied; it is clear in this instance that by its telegram the union notified the new employer that it was the bargaining agent and that it wished to meet with a view to making a collective agreement — the very thing contemplated by section 63(3). More importantly, in this case, the giving of notice under section 63(3) does not have any bearing on the union's right to strike. Its importance is that it triggers the employer's duty to bargain and opens to both parties the procedures and rights that arise thereafter under the Act.

32. For the foregoing reasons the Board must conclude that under the Act a union is not permitted to continue a strike when the sale or transfer of a business has occurred within the meaning of section 63 of the Act. Nor can a successor employer continue a lockout instituted before the transfer by its predecessor.

33. We turn to apply the foregoing conclusion to the facts of this case. The parties are agreed that the union has conducted a strike over a period of time during which we have found it could not lawfully do so. The only issue, therefore, is whether we should exercise our

discretion to so declare. In this case we are not persuaded that our discretion to grant a declaration or to order any further remedial relief should at this time be exercised against the union. It is well established that the Board will consider the conduct of an applicant in deciding whether to grant a declaration in respect of an unlawful strike or lockout (see, *Northdown Drywall and Construction Ltd.* [1972] OLRB Rep. June 666; *Canadian Elevator Manufacturers*, [1975] OLRB Rep. Nov. 868; *York County Board of Education*, [1980] OLRB Rep. Aug. 1154. From the first business day after the sale of the funeral chapel to the filing of this application the employer took the position with the union that the one employee at that location, Mr. Schoenfeldt, was terminated. On that basis it is difficult to see how through this application it can be heard, for the first time, to complain that the union has unlawfully withheld his services. The employer's response to the union and its apparent adherence to that position until the filing of this application must be viewed at the very least as creating a situation of substantial uncertainty. The Board has in the past declined to grant a declaration of an unlawful strike in favour of an applicant which has purported to terminate striking employees (see *Joyce and Smith Plating Co. Ltd.* 56 CLLC ¶18,048; *National Refractories Ltd.* 63 CLLC ¶16,276. We are satisfied that that is the appropriate conclusion in this case. We have no reason to doubt, moreover, that from the date of this decision the union and employees concerned will comply with the requirements of the Act.

34. For the foregoing reasons the application is dismissed.

DECISION OF BOARD MEMBER W. F. RUTHERFORD;

1. I concur with the decision dismissing the application. My difference with the panel majority is the interpretation of section 63 of the Act involving the sale of a business while a legal strike is in progress. Section 63(3) quoted in the main body of the report projects a union entitlement when a business is sold. I interpret this section of the Act to mean that the union is only entitled to their contractual position at the time of sale — If an agreement is in force it continues — If the parties are in the process of submitting amendments or negotiations that continues — If a legal strike or lockout is in effect that continues until settlement.

2. When an enterprise is purchased, the new owner involved in the purchase assumes all liabilities and assets accrued by the former owner, including any outstanding union arbitration awards.

3. The "entitled to give notice" in section 63(3) does not make it mandatory on the union to re-submit previous proposals to the new owner while on a legal strike. The new owner would have full knowledge of the bargaining progress of both sides while in the process of purchase of the enterprise.

4. The union's telegram to the new owner offering negotiations, while not mandatory, was a prudent move on behalf of the union. The fact that the company ignored the proposal of further negotiations was less than prudent.

2807-80-R; 0085-81-U United Cement, Lime, & Gypsum Workers International Union, Applicant/Complainant, v. Dominion Paving Limited, Respondent

Bargaining Unit – Certification Where Act Contravened – Discharge for Union Activity – Practice Procedure – Respondent carrying on distinct summer and winter operations – Employing construction and non-construction employees on different work and at different times – Whether unit to include both groups – Grievors discharged on application date – Whether anti-union motive – Whether discharged employees included in list – Whether Board certifying without regard to vote

BEFORE: Ian Springate, Vice-Chairman, and Board Members B. Armstrong and J. Ronson.

***APPEARANCES:** G. Charney, Q.C., R. Aveling and A. Natale for the applicant/complainant; Raimo T. Heikkila, Joe Racco and Michael Mannone for the respondent.*

DECISION OF THE BOARD; October 5, 1981

1. File No. 2807-80-R is an application for certification in which the applicant trade union originally requested the taking of a pre-hearing representation vote. The union now seeks to be certified pursuant to the provisions of section 8 of the *Labour Relations Act*. File No. 0085-81-U is a complaint under section 89 of the *Labour Relations Act* alleging that three individual grievors as well as the complainant trade union were dealt with by the respondent contrary to the provisions of sections 3, 64, 66 and 70 of the Act.

2. The respondent engages in two distinct types of operations. In the summer months it is involved in the construction and repair of roads, work which comes within the construction industry. Some forty employees are employed for this summer construction work, including truck drivers, labourers and equipment operators. From November to April of each year the respondent engages in the removal of snow and the salting of roads in Metropolitan Toronto, work which is not within the construction industry. The respondent generally employs about sixteen employees in its winter operation, most of whom temporarily reside in a camp on Murray Road in the Downsview district of North York so that they can be sent out whenever the weather requires.

3. There is a time gap of a few weeks between the end of the respondent's winter operations and the commencement of its summer operations. Further, although approximately half of the respondent's summer employees in any one year will return to work for the respondent during the following summer, very few employees work for the respondent during both its summer and winter operations. Almost all of the employees who work for the respondent during the winter do not also work for the respondent during its summer season.

4. The application for certification was filed on March 25, 1981, towards the end of the respondent's winter operations. It is the contention of the respondent that given the difference in the nature of its two types of operations, as well as the increase and changeover in staff between its winter and summer operations, the bargaining unit should be restricted to encompass only employees in its non-construction summer operations. For its part, the union

takes the position that the bargaining unit should take in employees engaged in both the respondent's summer and winter operations. As for the fact that such a bargaining unit would encompass both construction and non-construction operations, the applicant points to past cases where a union filed an application for certification under the general provisions of the Act and the Board certified it with respect to a bargaining unit which encompassed employees both in and outside of the construction industry. As for the fact that there were only some fifteen employees at work on the date of the making of the application, as opposed to the approximately forty employees the respondent employs during the summer months on its construction operations, the union contends that in dealing with seasonal operations such as the respondent's, the Board should not concern itself with fluctuations in the number of employees, but look only at the employees actually at work on the date of the making of the application.

5. In instances where an employer engages in both construction and non-construction activities, the Board's general practice is to group its employees into separate construction and non-construction bargaining units. However, where an employer engages in both construction and non-construction operations simultaneously using the same work force, the Board will on an application under the general provisions of the Act describe a bargaining unit which encompasses both operations. See: *Ethier Sand & Gravel Limited*, [1979] OLRB Rep. Oct. 962. In the instant proceedings, the respondent's construction and non-construction operations are not only carried out at different times of the year, but they are carried on with essentially different work forces. The nature of the work, and conditions of employment differ significantly between the two types of operations. In addition, whereas the applicant seeks a bargaining unit described in terms of "all employees" of the respondent, in recognition of the craft organization of the industry and so as to reduce the possibility of future jurisdictional disputes, the Board's practice is to restrict units in the construction industry (even where the application is filed under the general provisions of the Act) so as to include only the construction trades actually at work on the date of the making of the application. See: *Fielding Construction Company*, [1970] OLRB Rep. Jan 1205 and *A. N. Shaw Restoration Ltd.*, [1981] OLRB Rep. March 241. In the instant case there were no construction trades at work on the date of the making of the application. Taking all of these considerations into account, we are satisfied that the bargaining unit under consideration should be restricted only to employees engaged in the respondent's non-construction operations.

6. Having regard to the above determination, and the representations of the parties with respect to the bargaining unit description, the Board finds that all employees of the respondent in Metropolitan Toronto, save and except those engaged in construction work, non-working foremen, persons above the rank of non-working foreman, office and clerical staff and persons regularly employed for not more than twenty-four hours per week, constitute a unit of employees of the respondent appropriate for collective bargaining.

7. The parties disagree as to the number of employees in the bargaining unit on the date of the making of the application. This dispute centers around the status of the three grievors, all of whom were discharged on March 25, 1981, the date of the filing of the application. All of the grievors were at work on March 25, 1981 prior to their discharge. In these circumstances, we are satisfied that regardless of the legality of their discharges they were employees of the respondent on the day that the application was filed and that accordingly, their names should have been included on the list of employees. In reaching this conclusion, we have considered, but rejected, the respondent's contention that one of the grievors, Mr. Morris

Gazee, was not employed on a full-time basis by the respondent, but rather was a casual relief driver who worked primarily for a broker. Mr. Gazee worked at the respondent's camp for twenty-seven days prior to his discharge, twelve of them directly for the respondent and fifteen days allegedly for a broker. The respondent's general practice is to pay a broker so much a day to supply a truck and driver. With respect to Mr. Gazee, however, the broker was paid only for his truck, and the respondent paid Mr. Gazee directly, making the appropriate deductions from his pay. It is clear that Mr. Gazee was hired by the respondent and at all times was under the control of the respondent. The respondent could also terminate Mr. Gazee's services, as in fact it did. In these circumstances, we are satisfied that at the relevant time, Mr. Gazee was in fact employed on a full-time basis by the respondent, and that he was not primarily the employee of anyone else.

8. Having regard to the above, to the agreement of the parties concerning the remainder of the list of employees, the Board is satisfied that on the date of the making of the application there were a total of fifteen employees in the bargaining unit. The union filed evidence of membership indicating that at the time of the filing of the application six of the fifteen employees in the bargaining unit were members of the trade union.

9. In filing its application for certification, the union requested the taking of a pre-hearing representation vote. The matter came first before a differently constituted panel of the Board which determined a voting constituency and directed the taking of a pre-hearing vote. Such a vote was in fact conducted, but having regard to charges filed by the union and its request to be certified outright pursuant to section 8 of the Act, the Board directed that the ballot box be sealed and none of the ballots counted.

10. The union's request that it be certified pursuant to section 8 centers around the respondent's discharge of the three grievors, namely, Frank Colicchia, Morris Gazee and Jeff Ireland. Accordingly, we turn now to the section 89 complaint which alleges that the three grievors were discharged contrary to the provisions of the *Labour Relations Act*.

11. The three grievors testified before the Board. Testifying on behalf of the respondent were Mr. Joseph Racco, the respondent's general manager, as well as Mr. Michael Mannone, one of the respondent's foremen. The grievors when testifying corroborated each other on all major issues, and their evidence appeared reasonable in all of the circumstances. The testimony of Mr. Mannone and Mr. Racco differed in a number of material respects from that of the grievors. On certain of these same issues, the testimony of Mr. Mannone and Mr. Racco was sharply contradictory. Further, we found certain portions of the testimony of both Mr. Mannone and Mr. Racco to lack reasonableness when considered against the background of the other evidence before us. In all of these circumstances, we have accepted the evidence of the grievors wherever it is in conflict with that of the respondent's witnesses.

12. Mr. Ireland first started with the respondent in the latter part of July, 1979 as a construction worker. Although summer construction workers do not usually work for the respondent during the winter months, Mr. Ireland did in fact work for the respondent during the 1979-80 non-construction winter season, although apparently in March of 1980 he left the respondent's employ before the end of the season to go west. Mr. Ireland was re-hired by the respondent in November of 1980 for the 1980-81 winter season. Mr. Ireland was discharged by the respondent on March 25, 1981. Approximately five days previous to his discharge, Mr. Racco had advised Mr. Ireland that he could work for the respondent during the 1981 summer season driving a truck which the respondent had newly acquired.

13. Mr. Frank Colicchia is a close friend of Mr. Ireland. Mr. Colicchia started working for the respondent in February of 1980, but left before the end of the 1979-1980 winter season to go west with Mr. Ireland. Mr. Colicchia was re-hired in October or November 1980 to work as a truck driver during the 1980-1981 winter season.

14. Mr. Gazee was hired by the respondent towards the end of February 1981. Mr. Gazee is a qualified equipment operator, and on the day he was hired he was advised by Mr. Racco's father that there would be work for him the following summer as an equipment operator. As noted above, although Mr. Gazee was classified by the respondent as "part-time casual winter employee", in fact he put in full-time hours for the respondent.

15. On March 22, 1981, Mr. Gazee and Mr. Ireland discussed the possibility of having the respondent's employees represented by a trade union. The next day, Mr. Gazee contacted Mr. A. Natale, an international representative with the complainant trade union. Later that day, the two men met and Mr. Gazee received from Mr. Natale a number of unexecuted union cards which took the form of combination applications for membership and receipts. On March 24th, Mr. Gazee and Mr. Ireland approached employees to get them to sign the union cards. Mr. Colicchia was one of the employees who signed a card. Later that same day, Mr. Gazee and Mr. Ireland met for about half an hour with Mr. Natale near the camp and handed him the completed cards.

16. On the morning of March 25, 1981, a person identified at the hearing as a fair wage officer visited the respondent's camp, and began to talk to the employees about their working conditions. Their conversation was ended by Mr. Mannone, the respondent's foreman, directing the employees to perform a check on their trucks, including a radio check. During the check, a number of employees, including Mr. Gazee and Mr. Colicchia put the microphones up to their truck's radio. The evidence is that this type of activity was not uncommon. When Mr. Mannone became aware of this conduct on March 25, he warned the employees in no uncertain terms that the respondent would not tolerate this type of activity. At the hearing, those responsible for terminating Mr. Gazee and Mr. Ireland, namely Mr. Mannone and Mr. Racco respectively, did not contend that this incident with the radios was connected with their termination.

17. Subsequent to the truck check, Mr. Mannone advised Mr. Gazee that he was no longer required on the truck he had been driving, since Dave Durbin, a dispatcher who actually owned the truck, would be driving it. Mr. Gazee left the camp, but left behind his sleeping-bag, since he felt he might be called back.

18. After Mr. Gazee left the camp, he went to see Mr. Natale, the union's representative. Mr. Natale then telephoned Mr. Racco and asked why Mr. Gazee had been let go. Mr. Racco testified that he told Mr. Natale that he would check into the matter, and get back to him within half an hour. It is undisputed that Mr. Racco did not get back to Mr. Natale that day. Mr. Racco testified that he told Mr. Natale that Mr. Gazee had two hours to pick up his sleeping bag, and that if he showed up at any other time and something was later found to be missing, even a nail or a screw, he would hold Mr. Gazee responsible.

19. Meanwhile, back at the camp, one of the employees, Mr. Albert Lethbridge, had been drinking beer outside of the employee sleeping quarters. Mr. Mannone testified that he directed Mr. Lethbridge to go inside, at which point Mr. Lethbridge and Mr. Ireland told Mr.

Mannone that he had no right to tell employees where to drink. Mr. Mannone added that Mr. Lethbridge (who was discharged a week later for being intoxicated on the job) threatened to kick in his head.

20. At some point, either shortly before or shortly after the incident with Mr. Lethbridge, Mr. Mannone approached Mr. Ireland and asked why he was causing a ruckus. When Mr. Ireland asked what he meant, Mr. Mannone replied that the respondent and Metro knew that Mr. Natale had been around. Mr. Mannone also indicated that Mr. Ireland would later be fired.

21. Shortly after the exchange between Mr. Mannone and Mr. Ireland, Mr. Mannone parked a front-end loader across the entrance to the camp. When asked why he had done so, Mr. Mannone replied that Joe Rocco was on his way to the camp and no one was supposed to leave. Mr. Racco testified that he directed that the front-end loader be placed across the entrance to ensure that personnel from the Metropolitan Toronto Roads Department which was located next door could not use the camp's parking lot for turning their cars around.

22. At about 4:15 p.m., Mr. Racco arrived at the camp. After a brief discussion with Mr. Mannone, Mr. Racco had the front-end loader moved and called a meeting of the men. Mr. Ireland and Mr. Colicchia did not go into the meeting. Shortly thereafter the two were called into the meeting. When Mr. Ireland and Mr. Colicchia walked into the meeting, Mr. Racco told them they were fired because they were "pricks". At about 4:30 p.m., while Mr. Colicchia was packing his belongings, he was advised that he had until midnight to remove his truck, which at the time was being rebuilt and was non-operational, from the respondent's camp. At about 4:45 p.m., Mr. Racco told Mr. Ireland that the truck had to be out by 5:00 or he would drop the bucket of a loader on it. The truck was finally pushed out of the camp with the assistance of a number of employees prior to the 5:00 p.m. deadline.

23. Section 89(5) of the *Labour Relations Act* states as follows:

On an inquiry by the Board into a complaint under subsection 4 that a person has been refused employment, discharged, discriminated against, threatened, coerced, intimidated or otherwise dealt with contrary to this Act as to his employment, opportunity for employment or conditions of employment, the burden of proof that any employer or employers' organization did not act contrary to this Act lies upon the employer or employers' organization. 1975, c. 76, s. 21(1).

Accordingly, in this case the burden of proof is on the respondent to establish on the balance of probabilities that it did not act contrary to the Act in discharging the grievors.

24. In the *Barrie Examiner* case, [1975] OLRB Rep. Oct. 745, the Board stated:

... the effect of the reversal of the onus of proof is to require the employer to establish two fundamental facts. First, that the reasons given for the discharge are the only reasons and, second, that these reasons are not tainted by any anti-union motive. Both elements must be established on the balance of probabilities in order for the employer to establish that no violation of the Act has occurred.

25. During his examination-in-chief, Mr. Racco was asked why he discharged Mr. Ireland and Mr. Colicchia, to which he replied that it was because when he met with the employees on March 25, 1981 and asked if there were any problems, Mr. Ireland kept insisting that he had a right to do what he wanted in the camp. Later Mr. Racco widened this claim to allege that both Mr. Colicchia and Mr. Ireland had insisted at the meeting that they could do what they wanted. In cross-examination, Mr. Racco stated that the men had also been fired because they had failed to obey orders and had been drinking in the yard of the camp. Mr. Racco testified that he knew that Mr. Ireland and Mr. Colicchia, along with Mr. Gazee and Mr. Lethbridge, had been drinking because he had been so advised by Mr. Mannone. Mr. Mannone, however, testified that in his discussion with Mr. Racco, he did not specifically refer to either Mr. Ireland or Mr. Colicchia. Further, Mr. Mannone, in his testimony, made no reference to Mr. Ireland, Mr. Colicchia or Mr. Gazee as having been drinking in public. The only person Mr. Mannone said had been drinking was Mr. Lethbridge, who threatened to kick in Mr. Mannone's head. It is of some interest to note that Mr. Lethbridge was not discharged on March 25th. Further, with respect to Mr. Racco's claim that Mr. Ireland and Mr. Colicchia had misbehaved during the meeting, we accept the evidence of Mr. Ireland and Mr. Colicchia that they were called into the meeting and summarily fired without engaging in any discussion at all with Mr. Racco.

26. The person who terminated Mr. Gazee's services was Mr. Mannone. Mr. Mannone testified that after the visit of the fair wage officer, he telephoned Mr. J. Guilbeault, a driver who was apparently working in Kitchener at the time. According to Mr. Mannone, he advised Mr. Guilbeault that things were hectic at the camp, that the men were telling him what he could or could not do, that there was no controlling them after their meeting with the fair wage officer. According to Mr. Mannone, Mr. Guilbeault offered to return and take over the truck being driven by Mr. Gazee. Mr. Mannone further testified that he then called Mr. Gazee into the office and advised him that he was no longer required for the truck and was free to go, although he would be paid for the entire day, and that if the company needed him again he would be recalled. In cross-examination, Mr. Mannone agreed that Mr. Gazee had not been recalled to replace either Mr. Ireland or Mr. Colicchia after they had been fired. According to Mr. Mannone, one of them was replaced by a relief driver and the other by Mr. Dave Durbin, the dispatcher, who was in turn replaced by a relief dispatcher.

27. Mr. Mannone did not explain to the Board why of all the drivers, Mr. Gazee was the one chosen to be let go after the visit of the fair wage officer. In giving his testimony, Mr. Racco indicated that he had been advised by Mr. Mannone that Mr. Gazee's drinking had been a problem. Mr. Mannone, however, made no mention of Mr. Gazee having a drinking problem. Further, when on cross-examination Mr. Racco was advised that Mr. Gazee had testified that he did not drink alcoholic beverages, Mr. Racco indicated that he could not dispute that contention. Another consideration in this matter is that although Mr. Mannone testified that he called Mr. Guilbeault to replace Mr. Gazee, and that Mr. Durbin later replaced either Mr. Ireland or Mr. Colicchia, in fact on March 25th, Mr. Mannone advised Mr. Gazee that his services would no longer be required since the truck he had been driving would in future be driven by Dave Durbin, who actually owned the truck.

28. The reasons advanced by the respondent's witnesses as to why the three grievors were singled out to be terminated were contradictory and less than convincing. On the other hand, two of the grievors, Mr. Gazee and Mr. Ireland, were the ones who signed up the employees into the union and later met Mr. Natale near the camp to hand him the completed

cards. Mr. Mannone's comments to Mr. Ireland establish that the respondent had somehow become aware of Mr. Natale's presence near the camp, and also that Mr. Ireland was active with the union. In the circumstances, it is likely that whoever advised the respondent of Mr. Ireland's union involvement also advised the respondent of Mr. Gazee's even more active involvement. Mr. Colicchia is a close friend of Mr. Ireland. It would not have been unreasonable for the respondent to assume that since Mr. Ireland supported the union, so did Mr. Colicchia, as in fact he did.

29. Having regard to the reversal of the onus of proof, to be successful in this matter the respondent was required to establish that the reasons advanced by it to explain the termination of the three grievors were the only reasons for their termination and that the reasons were not tainted by any anti-union animus. Given the evidence before us, we must conclude that the respondent has failed to establish on the balance of probabilities that the reasons advanced by it for terminating the three grievors were in fact the real reasons. In these circumstances, we are led to conclude that the respondent terminated the three grievors in contravention of section 66 of the *Labour Relations Act*.

30. In these circumstances, the respondent is directed to compensate the grievors for loss of earnings and other employment benefits, with interest calculated in accordance with the principles set out in the Board's Practice Note No. 13, dated September 8, 1980. The evidence indicates that if the three grievors had not been terminated on March 25, 1981, they likely would have been laid off on March 31, 1981 as the respondent began to wind down its winter operations by first laying off employees who were driving rented trucks, as in fact the three grievors were. Accordingly, compensation for the winter period is to be calculated up to March 31, 1981. In that we are satisfied that prior to the events in question the respondent intended to employ both Mr. Ireland and Mr. Gazee in its non-construction summer activities, Mr. Ireland and Mr. Gazee are to be compensated for this period as well, subject to the general principles of mitigation. In reaching this decision, we have considered but rejected the contention of counsel for the respondent that any compensation must be restricted to employment in the bargaining unit. The respondent discharged the two men contrary to the provisions of the Act. They are, in turn, entitled to be put back into the same position they would have been in had the respondent not unlawfully terminated them, and had they not been terminated they would have worked for the respondent during its summer season. In his final submissions, counsel for the union contended that Mr. Colicchia had also been promised summer employment. The evidence before us, however, does not support this contention. The Board will remain seized of this matter in the event the union and the respondent are unable to reach agreement on the amount of compensation owing to the three grievors.

31. Section 64 of the Act prohibits an employer from interfering with the selection of a trade union or the representation by employees of a trade union. We are satisfied that the respondent's actions in terminating the three grievors because of their support for the trade union also constituted a breach of section 64 of the Act.

32. We turn now to consider the union's request that it be certified pursuant to the provisions of section 8 of the Act. Section 8 provides as follows:

Where an employer or employers' organization contravenes this Act so that the true wishes of the employees of the employer or of a member of the employers' organization are not likely to be ascertained, and, in the

opinion of the Board, a trade union has membership support adequate for the purposes of collective bargaining in a bargaining unit found by the Board pursuant to section 6 to be appropriate for collective bargaining, the Board may, on the application of the trade union, certify the trade union as the bargaining agent of the employees in the bargaining unit.

33. For the Board to apply section 8, three conditions must be met, namely:

- 1) the respondent has violated the Act;
- 2) because of the violation, the true wishes of the employees are not likely to be ascertained. In the instant case, that means that they are not likely to be ascertained from the results of the pre-hearing representation vote; and
- 3) the union has membership support adequate for the purposes of collective bargaining.

34. In support of the section 8 request, the union relied on the discharge of the three grievors, as well as on a telephone call by Mr. Racco to Mr. Ireland on the day prior to the pre-hearing representation vote. During their telephone conversation, Mr. Racco urged Mr. Ireland not to turn up to vote on pain of Mr. Racco informing the authorities that Mr. Ireland had at one time been improperly drawing unemployment insurance. Mr. Ireland did not show up to cast a ballot in the pre-hearing representation vote. We view Mr. Racco's conduct in this regard as employer interference with the selection of a trade union by an employee, and accordingly are satisfied that it amounted to a violation of section 56 of the Act.

35. We have already determined that the respondent contravened sections 64 and 66 of the Act. Having regard to the nature of the breach and the impact of the discharges on other employees, particularly the discharges of Mr. Ireland and Mr. Colicchia which were carried out in front of the other employees, as well as Mr. Racco's phone call to Mr. Ireland, we are satisfied that as a result of the respondent's breaches of the Act, the true wishes of the employees are not likely to be ascertained from the results of either the pre-hearing representation vote, or any other vote the Board might now order.

36. As already indicated, on the date of the filing of the application, the union had as members six of the fifteen, or forty per cent, of the employees in the bargaining unit. This, in our view, shows adequate support among a "core" of employees to allow the union to engage in collective bargaining. See: *K-Mart Canada Limited*, [1981] OLRB Rep. Jan. 60. We recognize that perhaps half of the employees employed by the respondent at the time of the filing of the application will not return for the forthcoming winter season. However, in our view, high employee turnover should not bar a union from certification under section 8. We also recognize that if the union is to achieve any meaningful long-term success, it must expand its support among both returning and new employees; however, in our view, it should be given the opportunity to attempt to do so. Further, so as to relieve against the "chilling" effect which the respondent's termination of the three grievors likely had on employee support for the union, the respondent is to post the notice referred to below.

37. Having regard to the foregoing, and pursuant to the provisions of section 8 of the Act, the Board hereby certifies the applicant as the bargaining agent of all employees of the respondent in Metropolitan Toronto, save and except those engaged in construction work, non-working foremen, persons above the rank of non-working foreman, office and clerical staff and persons regularly employed for not more than twenty-four hours per week.

38. The respondent is directed to post a copy of the attached notice, after being duly signed by the respondent's representative, in a conspicuous place where it is likely to come to the attention of employees in the bargaining unit. The notice is to be posted when the respondent commences its non-construction winter season, and it is to remain posted for sixty consecutive working days. Reasonable steps shall be taken by the respondent to ensure that the notice is not altered, defaced or covered by any other material. Reasonable physical access to the premises shall be given by the respondent to a representative of the complainant so that the complainant can satisfy itself that this posting requirement is being complied with. If, during the forthcoming winter season, the respondent employs bargaining unit employees at more than one camp or other location in Metropolitan Toronto, the above posting requirements shall apply to each such camp or other location.

NOTICE TO EMPLOYEES

Posted by Order of the Ontario Labour Relations Board

WE HAVE POSTED THIS NOTICE IN COMPLIANCE WITH AN ORDER OF THE ONTARIO LABOUR RELATIONS BOARD ISSUED AFTER A HEARING IN WHICH WE AND THE UNION PARTICIPATED. THE ONTARIO LABOUR RELATIONS BOARD FOUND THAT WE VIOLATED THE LABOUR RELATIONS ACT IN MARCH OF 1981 BY DISCHARGING FRANK COLICCHIA, MORRIS GAZEE, AND JEFF IRELAND.

THE ACT GIVES ALL EMPLOYEES THESE RIGHTS:

TO ORGANIZE THEMSELVES;

TO FORM, JOIN AND PARTICIPATE IN THE LAWFUL ACTIVITIES OF A TRADE UNION;

TO ACT TOGETHER FOR COLLECTIVE BARGAINING;

TO REFRAIN FROM DOING ANY AND ALL OF THESE THINGS.

WE ASSURE ALL OF OUR EMPLOYEES THAT:

WE WILL NOT DO ANYTHING THAT INTERFERES WITH THESE RIGHTS.

WE WILL NOT DISCHARGE ANY EMPLOYEE BECAUSE HE HAS SELECTED UNITED CEMENT, LIME AND GYPSUM WORKERS INTERNATIONAL UNION AS HIS BARGAINING REPRESENTATIVE.

WE WILL PAY FRANK COLICCHIA, MORRIS GAZEE AND JEFF IRELAND FOR ANY EARNINGS LOST AS A RESULT OF THEIR DISCHARGE, PLUS ACCRUED INTEREST.

WE WILL BARGAIN WITH UNITED CEMENT, LIME AND GYPSUM WORKERS INTERNATIONAL UNION AS THE DULY CERTIFIED BARGAINING REPRESENTATIVE OF OUR EMPLOYEES IN THE BARGAINING UNIT DESCRIBED BELOW AND IF AN UNDERSTANDING IS REACHED, WE WILL SIGN A COLLECTIVE AGREEMENT WITH THE UNION.

THE BARGAINING UNIT IS:

ALL EMPLOYEES OF DOMINION PAVING LIMITED IN METROPOLITAN TORONTO, SAVE AND EXCEPT THOSE ENGAGED IN CONSTRUCTION WORK, NON-WORKING FOREMEN, PERSONS ABOVE THE RANK OF NON-WORKING FOREMAN, OFFICE AND CLERICAL STAFF AND PERSONS REGULARLY EMPLOYED FOR NOT MORE THAN TWENTY-FOUR HOURS PER WEEK.

PER: (AUTHORIZED REPRESENTATIVE)

This is an official notice of the Board and must not be removed or defaced.

This notice must remain posted for 60 consecutive working days.

1273-81-R Chris Martin, Applicant, v. Sheet Metal Workers' International Association, Local Union No. 540, Respondent, v. Flexonics Division, UOP Limited, Intervenor

Duty to Bargain in Good Faith – Termination – Whether pending termination application relieving employer of duty to bargain – Whether Board outlining extent of duty

BEFORE: R. O MacDowell, Vice-Chairman, and Board Members H. Kobryn and J. Wilson.

APPEARANCES: *M. Horan and C. Martin for the applicant; B. Fishbein, K. Waisglass, R. Flood and N. Watt for the respondent; and M. Gordon, D. Peel and R. Kuhm for the intervenor.*

DECISION OF THE BOARD; October 27, 1981

1. This is an application for a declaration terminating the respondent union's bargaining rights, pursuant to section 57 of the *Labour Relations Act*. The principal issue before the Board is whether forty-five per cent of the intervenor's employees have *voluntarily* signified in writing that they no longer wish to be represented by the union. The respondent alleges that the intervenor's unlawful interference casts doubt on the "voluntariness" of the employee statements supporting this application.

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3. This matter first came on for a hearing before the Board on Friday, October 16th, and is scheduled to continue on November 23rd and 24th. It is evident that the issues raised on the application will remain unresolved for several weeks. In the interim, the employer seeks a direction from the Board relieving it of its obligation to bargain with the respondent until the "cloud" over its status as bargaining agent is removed, or, in the alternative, some direction concerning the scope or extent of its bargaining obligation under section 15 of the Act.

4. The facts forming the background to the intervenor's request are not in dispute. The termination application was filed on September 3rd, 1981. On or about September 4th, 1981, the union gave the employer notice to bargain, and thereafter, the parties engaged in negotiations with a view to concluding a new collective agreement. The union applied for conciliation and, despite the employer's objections, the Minister of Labour, by a letter dated October 9th, 1981, indicated that a conciliation officer would be appointed, and that in his view, the existence of an outstanding termination application was not a bar to such appointment. At the present time, no officer has been appointed, and no further meetings between the parties have actually been convened. It is possible (although not likely) that: the officer will be appointed; meetings will take place; the meetings will prove unsuccessful; the officer will recommend, and the Minister will issue, a "no Board report"; seventeen days will go by; and the right to strike will accrue — all before the termination application is resolved. It is also possible that the union and employer will resolve their differences and be in a position to conclude a new collective agreement before the Board has disposed of the application before it.

5. The intervenor employer argues that the termination application affects, and raises doubts about, the efficacy of continued collective bargaining until the union's status is resolved. At the very least, the intervenor argues, this Board should give some guidance as to

how the statutory duty to “bargain in good faith” applies in this situation. While there is no allegation that the respondent has not bargained “in good faith” such complaint is a distinct possibility which a Board direction might avoid.

6. The union contends that a Board seized with a termination application has no jurisdiction to make an order restricting the obligation of the employer to bargain in good faith, or relieving it of its responsibilities under section 15. In this respect, the union notes the absence of any language in section 57 similar to section 63(9) of the Act which specifically relieves an employer of the obligation to bargain while a successor status issue is being litigated. The union further argues that it would be unwise to speculate about how section 15 might be applied in this situation. The union admits that the pending termination proceedings *may* legitimately have an impact on the conduct of bargaining, but maintains that it is premature to address these issues, and relies on the general statement appearing in *Groves Park Lodge* [1979] OLRB Rep. Nov. 1088 at paragraph 9:

“If an application for termination, standing alone, were to place a veil of uncertainty over a union’s right to bargain on behalf of the employees, the rights of all concerned would be seriously prejudiced by the lengthy delays in bargaining that would inevitably follow. Unless the parties agree that bargaining should be deferred pending the determination of a termination application, it is in the best labour relations interests of the parties for the union and employer to proceed with their negotiations.

The union also relies upon the Board’s expressed view that a challenge to its jurisdiction to issue a certificate does not, in itself, relieve the employer of its obligation to bargain while the Court resolves that issue (see *Four B Manufacturing* [1978] OLRB Rep. August 741 and *Cable Tech Wire* [1978] OLRB Rep. October 895). The union argues that a termination application is an analogous situation. There do not appear to be any previous Board decisions analyzing the impact of a termination application on the parties’ duty to bargain under section 15.

7. We have carefully considered the intervenor’s submission in this matter, and especially its suggestion that, in the absence of decided cases before the Ontario Labour Relations Board on the point in issue, we should give consideration to the practice of the (U.S.) National Labour Relations Board. There too, there is an obligation to bargain in good faith based upon the union’s status as the majority representative of the employees, and the NLRB has consistently held that an employer’s “good faith doubt” concerning the union’s majority status is an effective defence in an unfair labour practice complaint alleging a breach of the duty to bargain. The short answer to this submission is that the U.S. statutory framework is quite different from that in Ontario, however, a perusal of the American cases reveals both that a decertification application does not, in itself, relieve an employer of its obligation to bargain, and the variety of other factors which bear upon the extent the employer’s bargaining obligation. Moreover, these issues do not seem to be raised as part of the representation proceeding, but rather in an unfair labour practice complaint alleging a breach of the duty to bargain in good faith. (See for example, *Valmac Industries Inc.* 101 LRRM 2389, *Anderson Cabinets* 103 LRRM 2103, *Sacramento Clinical Laboratory*, 105 LRRM 2054, *Sahara Tahoe Hotel*, 105 LRRM 3421, *Grede Foundaries Inc.* 104 LRRM 2646, *Rogers Manufacturing Co.*, 84 LRRM 2577, *Automated Business Systems*, 86 LRRM 2659, *Seeburg Corporation*, 82 LRRM 2225, *South West Chevrolet Corporation*, 79 LRRM 1156, *Texas Electric Coop Inc.*, 80 LRRM 1319, *Rogers Manufacturing Co.*, 80 LRRM 1548, *WAPI-TV*,

80 LRRM 1625, *Community Convalescent Hospital*, 82 LRRM 1222, *Toltec Metal Inc.*, 82 LRRM 1542, *National Cash Register Co.*, 82 LRRM 1620, etc.) These American cases amply illustrate the variety of factors which can bear upon the Board's assessment of the employer's bargaining obligation, and underline the union's contention that the Board should be hesitant to make any general statement with respect to this matter in the absence of a thorough review of all of the bargaining circumstances. These concerns are especially apposite in the instant case when the Board does not have a bargaining complaint before it, and is asked to speculate on a largely hypothetical situation. Thus, while the Board is not unsympathetic to the employer's dilemma, and acknowledges that a termination application *may* have an effect on the intervenor's bargaining obligation, the Board is not disposed to give the general directions which the employer now seeks.

0223-81-R; 0226-81-R; 0404-81-M United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 463, Applicant, v. **George Hamers Limited and L. & M. Plumbing & Heating**, Respondents.

Construction Industry Grievance – Related Employer – Whether two divisions had one legal personality – Whether single entity – Whether employer hiring non-union in contravention of collective agreement

BEFORE: E. Norris Davis, Vice-Chairman, and Board Members A. HersHKovitz and F. W. Murray.

APPEARANCES: *L. C. Arnold and C. Burroughs for the applicant; G. Grossman, Karl Schaaf and Charles Schaaf for the respondents.*

DECISION OF THE BOARD; October 27, 1981

1. Upon agreement of the parties the above files involving an application under section 63 of the Act, an application under section 1(4) of the Act and an application under section 124 of the Act, are hereby consolidated.
2. George Hamers Limited as incorporated in 1957 and in the same year became bound by a collective agreement in respect to its plumbing and pipefitting business. It is now bound by the provincial collective agreement between the Mechanical Contractors Association and the Ontario Pipe Trades Council of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, in respect to work in the I.C.I. sector.
3. From 1957 onwards Hamers' work was largely in school construction, some industrial construction and also service work which later was always carried out by a separate group of Hamers' employees. The service work at that time involved school boards in the area, various plants in the area and residential servicing of oil furnances. From 1955 there existed a

partnership between Leo Tiggelers and Mike Probinsky operating as L. & M Plumbing and Heating which was involved in service work and installations at shopping centres. Tiggelers, sometime in the 1960's, moved out of the country and Probinsky carried on by himself until 1967 when he approached Karl Schaaf to buy the operation. As a result, in 1967 George Hamers Ltd. acquired all the assets of the partnership, including the trade name, under the *Bulk Sales Act*. A Declaration of Dissolution of Partnership was filed June 12, 1967. Hamers since 1967 has owned L & M and there has been no change in structure since that time. Subsequent to this sale all service work done by Hamers was done under the name of L & M. Probinsky was employed and continued until 1970/71 to operate the service business under the name of L & M, and continuing to use the same shop and warehouse located at 137 Brock Street. Karl Schaaf in cross-examination was asked "From then on Hamers Ltd. carried on business as George Hamers Ltd. and as L & M?" and the response was "No, as George Hamers Ltd. and Mike Probinsky carried on as L & M". A further question was "Was Mike Probinsky employed by Hamers?" and the response was "By the income of L & M Company. Hamers had separate "income" and further "at the time of the takeover there was an arrangement between Probinsky and George Hamers Ltd. that he would operate L & M and would keep the profits as wages and would be given advances". With Probinsky's retirement the L & M business was stated to be more or less dormant with the service work earned out mainly by Karl Schaaf, the principal shareholder of George Hamers Limited, except for the summer months when students were hired to take care of furnace installations.

4. Charles Schaaf, son of Karl, who is currently in charge of the day to day business of L & M, became employed around 1969 or 1970 and completed his apprenticeship in 1974 or 1975 when he received his plumber's license. For a time prior to that date he was overseeing the jobs and taking care of the men. In his words, "I became like the Manager of L & M. L & M is a Division of George Hamers." While the L & M Business is currently conducted under the license of Charles Schaaf, it was, prior to his obtaining his license, conducted under the license of Karl Schaaf.

5. Currently, there are persons employed in the office, Karl and Charles Schaaf and Mrs. Karl Schaaf, as unpaid employees. Karl Schaaf stated he was not a paid employee although he had been at one time. He pays Charles from the L & M account. At previous times there was also a secretary up to 1976, and two supervisors. One of these supervisors had started as a sheetmetal apprentice with L & M and was promoted to supervisor in Hamers. It appears that from 1978 there was only one supervisor and that condition existed till March 1981. The secretary and supervisors were employed by George Hamers Ltd. and did work for L & M for which an annual accounting charge was made. Separate stationary is used for Hamers and for L & M, and there are separate bank accounts with Karl Schaaf signing cheque on both. Hamers has a line of bank credit. L & M does not. There are no inter company transfers of money. An outside Accounting firm performs work for Hamers and L & M. Karl Schaaf stated "There are separate books and statements for both companies including balance sheets".

6. Robert Wood, hired in 1978 as a supervisor was responsible for estimating jobs for Hamers and Karl Schaaf testified that Wood did no estimating for L & M but that any estimating was done between Charles and himself. Wood, on the other hand testified that he had done some estimating work for L & M perhaps a year before April 1980 which was the time at which both Hamers and L & M moved to an address on Charles Street.

7. In respect to the acquisition of business, Hamers acquired business mostly through public tender and through the Bid Depositary. As a result of the market conditions work for school boards and industrial construction fell off drastically with the result that where, at one time, Hamers employed a peak of 25-30 employees, in 1980 it was 4-5 employees and in July 1980 the roster was down to two employees and since May 1981 there have been no employees. In the case of L & M Charles Schaaf testified that a lot of business is acquired through word of mouth, advertising and personal contacts as well as repeat business, but sometimes in respect to public bidding invitation. In response to a question relating to a job at a bank in Bowmanville in 1981, as to whether the job had been bid by Hamers, Charles Schaaf stated "I don't know . . . but the General Contractor said he had a contract with L & M. I think my father bid it. He oversees 99 per cent of the bidding". And when asked who signed L & M contracts the response was "My father signs. Sometimes I do". We note that a contract executed January 3, 1973 between Pineridge Management Construction (a Division of Ronald C. Deeth Ltd. and L & M Plumbing (a Division of George Hamers Ltd.) is signed on behalf of the latter by "K. Schaaf, President".

8. It was Wood's testimony that it was his practice to make bids on behalf of Hamers from information gleaned from the Daily Commercial News unless instructed to make bids on behalf of L & M. Throughout a year he would bid an average of four jobs per week for Hamers, and stated on the same period he had successfully bid on four jobs for L & M.

9. L & M, prior to the purchase by Hamers, operated out of a shop at 137 Brock Street. Hamers operated at a location at 210 Brock Street up to 1964 when it remodelled a section of the storage yard immediately behind this location and with an address of all Colborne Street. The Colborne Street property was sold in 1980 and the entire operation moved to a new address on Charles Street. Up to that time the L & M group worked mainly out of the Brock Street shop but used Colborne Street as a meeting place, and for gassing trucks. Some materials were stored there and some use was made of the shop facilities there. The entrance to the office at Charles Street bears a plaque with the name at the top of "George Hamers Ltd., Mechanical Contractors" and a phone number together with "L & M Plumbing & Heating Division" and a phone number. There had been no sign at the Colborne Street location regarding "L & M" or "L & M Division". The Charles Street property is leased by Karl Schaaf personally from a Peter Vanhood, and the rent is paid in alternate months by a Hamers or L & M cheque.

10. Trucks are registered in the names of Hamers and of L & M and are painted distinctively different colors. Basic materials inventory is the Hamers inventory and everything is now stored under one roof and it was Charles's practice all along to draw from this inventory when short. Equipment for Hamers and for L & M is painted different colors and used interchangeably from time to time. Most of the L & M equipment is stored on the L & M truck with the "bigger stuff" stored at Brock Street.

11. The applicant argued, initially, that it is a condition precedent to the exercise of the Board's discretion under section 1(4) that there be more than one legal entity carrying on an associated or related business or activity and that the evidence before us establishes the existence of only one legal entity, George Hamers Ltd. The applicant relied on the case of *General Bakeries Limited* [1979] OLRB Rep. May, 400. The respondent took an opposite view of the evidence and that L & M Plumbing and Heating was a Division of George Hamers Ltd. The respondent argued that the Board in its *Radio Shack* decision [1979] OLRB Rep. July,

689 recognized that a division of a corporation was an entity within the meaning of section 1(4).

12. The Board's consistent approach to applications under this section is succinctly set out in paragraph 7 of the *Radio Shack* decision, *supra*, as follows:

"Section 1(4) of the Act provides:

'Where, in the opinion of the Board, associated or related activities or businesses are carried on, whether or not simultaneously by or through more than one corporation, individual, firm, syndicate or association or any combination thereof, under common control or direction, the Board may, upon the application of any person, trade union or council of trade unions concerned, treat the corporations, individuals, firms, syndicates or associations or any combination thereof as constituting one employer for the purposes of this Act and grant such relief, by way of declaration or otherwise, as it may deem appropriate.'

Section 1(4) of the Act is designed to deal with situations where more than one legal entity carries on related business or activities under common control and direction and where 'it may not make industrial relations sense to allow the legal form to dictate and possibly fragment the collective bargaining structure.' There are three conditions which must be met before the section can be applied.

- (a) There must be more than one corporation, firm or individual association or syndicate involved.
- (b) These entities must be under common control or direction, and
- (c) they must be engaged in associated or related business activities.

If these three conditions are met the Board is given a discretion under the statute to make a declaration that the entities in question constitute one employer for purposes of the Act. The Board has consistently exercised its discretion under section 1(4) to preserve rather than to extend bargaining rights. It has been reluctant, however, to make a section 1(4) declaration where the applicant union has delayed its application with the result that the declaration will impose a bargaining agent upon a group of employees who may desire a different bargaining agent or no bargaining agent at all."

The decision in the *General Bakeries Limited* case, *supra*, similarly makes it clear that the Board there proceeded on the application of the same principles as enunciated in *Radio Shack*. The ratio for the Board's decision in *General Bakeries Limited* is set out as,

"In the case before us we have only one legal entity, General Bakeries

Limited. That corporation has divisions within it but none of the divisions relevant to the disposition of the matter before us has separate legal personality or entity apart from General Bakeries Limited. Therefore, the application under section 1(4) cannot succeed.”

It becomes evident that whether a segment of a corporation’s business, designated by it as a division, is to be treated as a legal entity or not is a question of fact in each case.

13. The use of the word “division” as descriptive of a business’ activities has many and varied connotations, and is, of itself, not determinative of the existence of a separate business entity. In the case before us the evidence is not clear that the word “division” was from 1967 always included as part of the identification of L & M Plumbing and Heating. It is clear, however, that as far back as 1973 contracts were signed in which one of the parties is identified as “L & M Plumbing (A Division of George Hamers Limited)”, and that since 1980 the business offices have been signed “George Hamers Limited, mechanical contractors and immediately below that “L & M Plumbing & Heating, Division”. Accepting as fact that “L & M” is known as a division of George Hamers Limited, the question before us is whether “L & M” is itself a legal personality or entity apart from George Hamers Limited.

14. The Board notes that prior to the 1967 acquisition by George Hamers Limited of the assets, there had existed a legal entity in the form of a joint partnership which carried on business under the name of L & M Plumbing and Heating. That partnership was dissolved June 12, 1967 and amongst the assets acquired by Hamers was the trading name “L & M Plumbing and Heating”. Immediately prior to the sale, the legal personality or business entity was the joint partnership and it was dissolved concurrent with the sale. George Hamers Limited remained an ongoing legal personality or entity and it is the Board’s task to determine whether, subsequent to the sale, a new legal personality or business entity was created.

15. The Board also notes that for some years prior to 1967 George Hamers Limited had both a construction operation in the I.C.I. sector and a collective agreement relating to that operation, and also a separate group of employees in a service operation both of which did business under the name of George Hamers Limited. In our view the acquisition of assets from the joint partnership by George Hamers Limited in itself in no way changed the employer-employee relationship of those two groups. All persons employed in the construction operation and in the service operation at the time of the 1967 purchase were employees of George Hamers Limited. Subsequent to the sale the service operation of George Hamers Limited continued to do business in the same segment of the market under the name of “L & M Plumbing and Heating”, and it was established that there had been no structural organization changes since 1967.

16. It was Karl Schaaf’s testimony that, concurrent with the 1967 purchase, there was an arrangement with Probinsky (a former partner) to operate L & M and to keep the profits as wages. Schaaf stated that “Probinsky carried on as L & M” and when asked if Probinsky was employed by Hamers, he replied “By the income of L & M Company. Hamers had separate income”. It must be noted that the use of the word “Company” in Schaaf’s response has to be viewed as only a convenience in reference inasmuch as there was no evidence of any “Company” other than George Hamers Limited. We concluded that whatever the mode of remuneration of Probinsky, his status was that of an employee of George Hamers Limited, and it was George Hamers Limited which owned the assets and carried on the business. It was

stated that truck vehicles were now registered in the names of George Hames Limited and L & M Plumbing and Heating and that there was a segregation of tools used by the construction operation and the service operation. There was evidence that there is a separate income statement and balance sheet for the L & M operation and that this is consolidated for reporting purposes of National Revenue. There was no evidence as to the assets originally acquired in 1967 being transferred in part or totally to the L & M balance sheet. Subsequent to Probinsky's departure from the scene in 1970 or 1971 the service operation continued at a low level with the actual work being carried out by Karl Schaaf until the completion of Charles Schaaf's apprenticeship in 1974 or 1975 when, around that time, in his words, "I became like the Manager of L & M. L & M is a division of George Hamers."

17. The Board concludes that from the time of the purchase/sale in 1967 and the years immediately following there existed only one legal personality or business entity, that being George Hamers Limited. The Board also concludes that there was no change in the conduct of business activities thereafter from which it can be concluded that at any stage there had evolved an additional business entity.

18. In the *Radio Shack* case, *supra*, the Board dealt with two divisions of one company which each, in its business activities, acted totally independent of one another. There was no commonalty of management in the day to day activities and each division reported individually to the corporate headquarters of the parent corporation in the United States. There is no such sharp distinctions in the present case of Hamers and L & M each acting as individually integrated business entities. Indeed the Board must conclude that the business activities in the construction sector and in the service sector were directed on a day-to-day basis by the same management and the interposition of Charles Schaaf as manager of the service activities does not detract from that conclusion.

19. In the acquisition of work to be performed by L & M, much of the service work came to it by reason of repeat customers, word of mouth, advertising and personal solicitation of Charles Schaaf. However in that area where there was a response to invitation to tender it was established that Karl Schaaf and/or the estimator employed by George Hamers Limited exercised a determining judgement as to whether bids were submitted in the name of George Hamers Limited or in the name of L & M. Karl Schaaf testified that he invariably used Hamers forces to do L & M work and used the L & M bidding procedure to get work for Hamers. Moreover, on Charles Schaaf's evidence, 99 per cent of the contracts which L & M entered into were signed by Karl Schaaf and in some cases it was apparent that Charles Schaaf, as Manager of L & M, had no input into the decision to bid for a job and no knowledge that a bid had been submitted in the name of L & M. In at least one instance on where Charles Schaaf worked on a project he had no knowledge whether the contract was in the name of Hamers or of L & M. In at least one case where a contract had been secured in the name of L & M, Karl Schaaf decided that the work would be "sub-contracted" to George Hamers Limited in order to provide employment to employees in the construction sector. It was also established that Karl Schaaf was consulted by Charles Schaaf prior to making an employment decision in respect to hiring an employee for the L & M Division. From all of the evidence, the Board concludes that the facts of the case before us most closely resembles the facts existing in the *General Bakeries Limited* case, *supra*. Rather than a separate and individual entity conducting its business affairs totally independent of other Divisions as existed in *Radio Shack*, what we have in the case before us is a division whose business affairs are directed and controlled on a day-to-day basis in such a manner as is more consistent with the conclusion that George Hamers Limited

was carrying on business under its corporate name and the name of L & M Plumbing and Heating, than with a conclusion that L & M was a separately identifiable integrated entity in the conduct of business activities. This conclusion is fortified by the absence of any evidence that there existed any legal personality other than that of George Hamers Limited.

20. For all of the foregoing reasons the application under section 1(4) must be dismissed.

21. The application brought under section 63 of the Act was not seriously pressed. The evidence was clear that at the time at which George Limited acquired the assets of L & M, there was no collective agreement in force covering the employees of the joint partnership. Under such circumstances the provisions of section 63 are not applicable and the application must therefore be dismissed.

22. Implicit in our finding that L & M is not a separate legal personality or entity is the finding that persons employed primarily in the service sector under the supervision of L & M were, in fact, employees of George Hamers Limited. George Hamers Limited is bound by a collective agreement with the applicant running from May 21, 1980 to April 30, 1982 in respect to all employees working in the I.C.I. sector of the construction industry as plumbers, steamfitters, pipefitters, welders and apprentices thereof. Article 12 of that collective agreement requires an employee to be in good standing with the union as a condition of employment and Article 101 defines certain obligations and procedures in respect to hiring of employees. The union has referred a grievance under section 124 of the Act to the Board for final and binding determination.

23. L & M acquired a construction contract in 1980 respecting the Royal Bank in Bowmanville and the contract was completed in January, 1981. The greater part of the plumbing work was completed by John Turner, an employee of Hamers construction operation. Charles Schaaf explained that at the time there was no work available for Turner in the construction operation and Schaaf didn't want to see Turner laid off. Charles Schaaf himself installed the gas piping on the roof. Mr. Chris Burrows, Union Business Agent, stated he had visited the site in January, 1981 and was informed by the superintendent of the general contractor that the job was a Hamer's job. Burrows phoned John Turner that night and Turner stated the job was a Hamer's job and that he was doing it. One week later, Burrows followed a Hamer's truck to the Bowmanville site where the ladders and piping were unloaded by the truck driver, Charles Schaaf and one other. Burrows talked to Schaaf stating that he had been under the impression this was a Hamer's job, to which Schaaf replied "What difference does it make". Burrows informed Schaaf he intended the remainder of the work to be done by Hamers, and subsequently spoke to Turner telling him to be sure he completed the job and not L & M. Burrows stated that several nights later Turner informed him that the gas lines had been completed by L & M. Turner gave evidence corroborative of Burrows.

24. The Board finds that work which fell within the scope of the collective agreement between Hamers and the applicant was performed on the Royal Bank site by Charles Schaaf, an employee of George Hamers Limited who was not a member of the applicant.

25. In respect to a project in 1981 at Dupont, Charles Schaaf testified that he had worked on the job with John Turner and was not aware whether it was a Hamer's contract or not. He stated that in signing in on the job it was possible that he had indicated he was a

Hamer's employee by putting ditto marks under Turner's name, and that he had been on the job at times when he did not sign in at all. There was insufficient evidence to establish the nature of work which may have been done by Charles Schaaf on this particular job and the Board makes no finding.

26. In respect to a construction project at the Whitby Police Station in 1981, Charles Schaaf testified that John Turner had done the roughing in plumbing work and that Charles Schaaf finished the work. Turner testified he had voiced an objection to Schaaf that if he (Turner) started a job, even though it was a L & M job, that he should finish that job as otherwise it would "create union problems for all of us", and that Schaaf seemed to agree. The Board finds that there was work performed on this project by Charles Schaaf which fell within the scope of coverage of the collective agreement.

27. The Board finds that in respect to work done by Charles Schaaf on the Royal Bank Bowmanville project, and in the Whitby Police Station project which fell within the scope of work covered by the collective agreement, George Hamers Limited was in violation of that collective agreement. George Hamers Limited, by assigning an employee, not a member of the union, to do such work disregarded Article 12.1 of the collective agreement requiring such employees to be "in good standing with the union" and Articles 101.1 and 101.4 relating to its obligation to give preference in employment to union members and to notify the union in advance of its manpower requirements. The union is entitled to damages for any losses suffered as a consequence of such violations and in the event the parties are unable to agree on the quantum of such losses the Board will remain seized of the matter.

1197-81-R Teamsters Local Union No. 419, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Applicant, v. **Greb Industries**, A Division of Warrington Inc., v. Respondent, Group of Employees, Objectors.

Certification – Petition – Employee circulating petition – Discussing it with manager – Signature obtained when manager in vicinity – Whether petition voluntary

BEFORE: Ian Springate, Vice-Chairman, and Board Members C. A. Ballentine and C. G. Bourne.

APPEARANCES: *Ken Petryshen and Don Swait, for the applicant; James B. Noonan, Paul Bates, R. C. Ward, James Bartlett, M. B. Dennison and Robert Reece, for the respondent; Kim Flowers for the objectors.*

DECISION OF IAN SPRINGATE, VICE-CHAIRMAN, AND BOARD MEMBER C.A. BALLENTINE; October 16, 1981

1. This is an application for certification.

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3. We find that the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act*.

4. Having regard to the agreement of the parties, we find that all employees of the respondent in Mississauga, Ontario, save and except foremen, persons above the rank of foreman, office, clerical and sales staff, and students employed during the school vacation period, constitute a unit of employees of the respondent appropriate for collective bargaining.

5. For the purposes of clarity, we note the agreement of the parties that:

- (a) persons commonly referred to as "lead hands" are in fact foremen excluded from the bargaining unit;
- (b) office and clerical staff working in the respondent's warehouse are not included in the bargaining unit; and
- (c) under the respondent's present method of operation, the truck drivers servicing the respondent's Mississauga warehouse are not employed in Mississauga and are therefore outside the bargaining unit.

6. On the date of the making of the application, there were thirty-one employees in the bargaining unit. The applicant filed documentary evidence of membership on behalf of twenty of these employees. This documentary evidence takes the form of membership cards which include a combination application for membership and an attached receipt. The cards are signed by the employees, and the receipts are countersigned, and indicate that a payment of one dollar has been made to the union. The documentary evidence is supported by a properly completed form 8 "Declaration Concerning Membership Documents", signed by an official of the applicant trade union. On the basis of this material, we are satisfied that more than fifty-five per cent of the employees of the respondent in the bargaining unit at the time the application was made, were members of the applicant on September 9, 1981, the terminal date fixed for this application and the date which we determine, under section 103(1)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

7. There was also filed with the Board a number of identically worded statements of desire in opposition to the application signed by employees in the bargaining unit. Statements of desire are not regulated by the Act as directly, or precisely, as union membership evidence. There is no statutory definition equivalent to section 1(1)(1), nor is there any requirement for a monetary payment (in the nature of consideration confirming the act of signing), or a declaration of regularity similar to Form 8. Nevertheless, the existence of statements of desire appears to be contemplated by section 103(1)(j) of the Act and Rule 48 of the Rules of Practice; and in any event, the Board has a long established practice of accepting statements of desire and exercising its discretion under section 7(2) of the Act to order a representation vote where: the statements are voluntary, there is evidence given in accordance with Rule 48, and the statements contain the signatures of a sufficient number of persons who have previously signed membership cards that there is some doubt that the union's members continue to support its certification.

8. In the instant case, sixteen of the thirty-one employees in the bargaining unit signed statements of desire in opposition to the application. Of these sixteen employees, five had previously signed union membership cards indicating that they supported the union's certification. If we were satisfied that the union members who signed statements of desire did so voluntarily, we would have before us two contradictory pieces of documentary evidence concerning the employees' wishes and would, in accordance with the Board's usual practice, exercise our discretion under section 7(2) of the Act and direct the taking of a representation vote to resolve the issue.

9. Before the Board will direct the taking of a representation vote on the basis of employee statements of desire, it must be satisfied that when union members signed a statement of desire evidencing an apparent change of heart, they did so voluntarily and were not motivated by a concern that their failure to sign would be communicated to their employer or could result in reprisals. The Board's concerns in this regard were expressed as follows in the *Radio Shack* case [1978] Rep. Nov. 1043:

"The Board has long held that there is an onus on a party relying on a statement of desire in opposition to an application for certification to establish that the "sudden change of heart" by those who have signed for the union, represents a voluntary change of heart. The Board recognizes the delicate and responsive nature of the employer-employee relationship and having regard to it, is circumspect in its assessment of the voluntariness of any statement of desire which bears the signatures of employees who have also signed cards in support of the union. The Board's approach to these matters is described in the leading *Pigott Motors* case, 63 CLLC 16, 264 in the following terms:

'In view of the responsive nature of his relationship with his employer and of his natural desire to want to appear to identify himself with the interests and wishes of his employer, an employee is obviously peculiarly vulnerable to influences, obvious or devious, which may operate to impair or destroy the free exercise of his rights under the Act. It is precisely for this reason and because the Board has discovered in a not inconsiderable number of cases that management has improperly inhibited or interfered with the free exercise by employees of their rights under the Act, that the Board has required evidence of a form and of a nature which will provide some reasonable assurance that a document such as a petition signed by employees purporting to express opposition to the certification of a trade union, truly and accurately reflects the voluntary wishes of the signatories.'

Having regard to the sensitive nature of the employer-employee relationship, the Board has consistently held that it must be governed by the overall environment in the work place in deciding whether or not the statement of desire represents a voluntary expression of those who signed it. If the evidence establishes that the hand of management has been actively involved in its origination, preparation or circulation, the Board will dismiss the statement. The Board will also, however, dismiss

the statement if the evidence establishes that an employee might reasonably suspect the involvement of management and hence be concerned as to whether or not management might become aware of his decision to sign it or not to sign it. (See *Morgan Adhesives of Canada Ltd.* and *Canadian Paperworkers Union*, [1975] OLRB Rep. No. 813 and the cases cited therein.)”

10. In assessing the voluntariness of a statement of desire, and in accordance with Rule 48(5) of the Board’s Rules of Procedure, the Board requires first-hand evidence of the circumstances surrounding the origination, preparation and circulation of the statement of desire. The “Notice to Employees of Application for Certification and of Hearing” clearly outlines the Board’s requirements in this regard. Paragraph 7 of the Notice states as follows:

Any employee, or group of employees, who has informed the Board in writing of his or their desire in accordance with paragraphs 4 and 5 may attend and be heard at the hearing in person or by a representative. Any employee or representative who appears at the hearing will be required to testify, or produce a witness or witnesses who will be able to testify from his or their personal knowledge and observation, as to (a) the circumstances concerning the origination of the material filed, and (b) *the manner in which each of the signatures was obtained.* (emphasis added)

EXPLANATORY NOTE: Where employees fail to attend in person or by a representative or to testify or produce witnesses to testify as provided in paragraph 7 above, the Board normally does not accept the statement of desire as casting doubt on the evidence of membership filed by the applicant.

11. Mr. Kim Flowers, an employee in the bargaining unit, was the person most actively involved in obtaining signatures on the statements of desire. Mr. Flowers witnessed the signatures of thirteen of the sixteen bargaining unit employees who signed the statements of desire. Counsel for the applicant trade union contended that because of Mr. Flowers’ discussions about his activities with Mr. Terry Trainer, a person generally referred to as a lead hand but who in fact functions in the capacity of foreman, as well as the fact that Mr. Flowers approached certain employees to get them to sign a statement of desire when Mr. Trainer was in the vicinity, the Board should decline to give weight to any of the signatures witnessed by Mr. Flowers. Counsel for the respondent, however, contended that the evidence before the Board indicated that notwithstanding Mr. Trainer’s actual status, Mr. Flowers and other employees did not perceive Mr. Trainer to be managerial and accordingly his presence would not have had any influence on the decision of employees to sign a statement of desire. We have strong reservations about the voluntariness of employee signatures obtained by Mr. Flowers when Mr. Trainer was in the vicinity. Although Mr. Flowers and two other witnesses testifying on behalf of the objecting employees stated that they did not view Mr. Trainer as managerial, other employees may well have viewed Mr. Trainer as managerial, particularly in that he does exercise managerial functions. Unfortunately, we do not know which employees were approached to sign a statement of desire by Mr. Flowers when Mr. Trainer was in the vicinity. However, in the circumstances of this case there is no need to come to any final conclusion with respect to the voluntariness of any of the signatures obtained by Mr. Flowers. As indicated above, Mr. Flowers did not witness the signatures of three employees who signed a statement

of desire. As it happens, these three employees were among the five employees who signed a statement of desire after having previously become members of the trade union. There is no evidence before the Board concerning the circumstances under which these three union members signed statements of desire, and as to whether or not managerial personnel might have had some impact on their decision to sign. In these circumstances, we are of the view that the voluntariness of their signatures on the statements of desire has not been proven. Even if we were to accept that the other two union members did sign a statement of desire voluntarily, nevertheless their signatures alone would not be sufficient in the circumstances to casue us to doubt that more than fifty-five percent of the employees in the bargaining unit continued as of the terminal date to support the union's certification. Accordingly, we decline to exercise our discretion to direct the taking of a representation vote.

12. Before leaving this matter, we would refer to the evidence of Mr. Wayne Jarrett, a former employee of the respondent, who testified that he observed a meeting attended by, amongst others, Mr. Flowers and Mr. Reece, the respondent's warehouse manager, just prior to when Mr. Flowers began to approach employees about signing the statements of desire. One possible implication which might be drawn from this evidence is that Mr. Flowers and Mr. Reece were in communication with respect to the statements of desire. In giving, his evidence we do not know whether Mr. Jarrett was deliberately seeking to mislead the Board with respect to this alleged meeting (and if so, why) or whether he innocently recalled an earlier meeting as having been held on the day that Mr. Flowers began his activities to oppose the application. However, whatever the case, we are satisfied that no meeting was in fact held at the time claimed by Mr. Jarrett and that at all times Mr. Flowers was acting on his own initiative without having previously discussed the matter with Mr. Reece.

13. Having regard to the union's membership position, and our decision not to exercise our discretion to direct the taking of a representation vote, a certificate will issue to the applicant.

DECISION OF BOARD MEMBER C. G. BOURNE;

1. I dissent.

2. There have been no allegations of intimidation or coercion in this case, and as the majority have stated in paragraph 8, sixteen of thirty-one employees signed a petition in opposition to the union, only five of whom had previously signed union cards.

3. This would appear to me to be a classic case for the holding of a representation vote so that employees could freely express their preference and I would have so directed.

1130-81-R International Association of Heat and Frost Insulators and Asbestos Workers, Local 95, Applicant, v. **Guaranteed Insulation '77 Limited** and Expert Respondents, v. Christian Labour Association of Canada, Intervener.

Practice and Procedure – Related Employer – Sale of a Business – Whether application making out prima facie case – Whether lacking in particularity – Board discussing restricted application of rule 47 to sale and related employer applications

BEFORE: R. D. Howe, Vice-Chairman, and Board Members C. G. Bourne and B. L. Armstrong.

APPEARANCES: M. Zigler and B. McQueen for the applicant; William S. Challis for the respondents; John Adema for the intervener.

DECISION OF THE BOARD; October 23, 1981

1. This is an application under section 63 of the *Labour Relations Act* in which relief is also requested under section 1(4) of the Act.

2. The application alleges that a sale of a business by the respondent Guaranteed Insulation '77 Limited ("Guaranteed") to the respondent Expert Insulation Ltd. ("Expert") took place on a date which is unknown to the applicant or, alternatively, that the respondents should be treated as constituting one employer for the purposes of the Act in that, at all material times, they were carrying on associated or related activities or businesses under common control or direction within the meaning of section 1(4) of the Act. As a result, the applicant contends that Expert, or each of the respondents as one employer, is bound by a collective agreement entered into by the applicant and the Master Insulators' Association of Ontario, Incorporated, expressed to be effective from September 10, 1980 to April 30, 1982.

3. Schedule "B" attached to the application reads as follows:

"12. Other relevant statements, including a statement of events which led to this application:

(a) Guaranteed Insulation '77 Limited is a corporation incorporated on December 6th, 1977 with its head office located at 2843B Kingston Road, Scarborough, Ontario and has carried on the business of an insulation contractor in the Province of Ontario.

(b) Expert Insulation Ltd. is a corporation incorporated on June 20th, 1979 with its head office located at 23 South Marine Drive, Scarborough, Ontario and has carried on the business of an insulation contractor in the Province of Ontario.

(c) The registered directors and officers of Guaranteed Insulation '77 Limited are Thomas G. Kirton and Geralddean Kirton.

(d) The registered director and officer of Expert Insulation Ltd. is Thomas G. Kirton.

(e) Geraldean Kirton is the wife of Thomas Kirton.

(f) The Applicant and Guaranteed Insulation '77 Limited, at all material times, were bound by the collective agreement referred to in paragraph 7(a) hereof.

(g) At all material times, Guaranteed Insulation '77 Limited and/or Expert Insulation Ltd. and/or Guaranteed Insulation '77 Limited and Expert Insulation Ltd., as one employer under Section 1(4) of the Act, as the case may be, have been engaged as insulation contractors at various construction projects throughout Ontario.

(h) Guaranteed Insulation '77 Limited and/or Expert Insulation Ltd. and/or Guaranteed Insulation '77 Limited and Expert Insulation Ltd. as one employer under Section 1(4) of the Act, as the case may be, have failed or refused to apply any of the terms of the collective agreement referred to in paragraph 7(a) hereof to work covered thereunder at their projects.

(i) The Applicant states and the fact is that the arrangements between Guaranteed Insulation '77 Limited and Expert Insulation Ltd. were solely designed to impede and frustrate the Applicant's bargaining rights and collective agreements in respect thereof referred to in paragraph 7(a) hereon, which conduct has led directly to this application."

4. In their respective replies to the applicant, the respondents deny there has been a sale of a business within the meaning of section 63 of the Act, and also deny that they are related employers within the meaning of section 1(4). Each of the respondents also states in its reply:

"The statements contained in the application are so indefinite or incomplete as to hamper the Respondent in the preparation of its case. The Respondent requests that the Board direct the Applicant to make the information stated specific and complete. The Respondent demands of the Applicant particulars in respect of each and every allegation made in the application and at Schedule 'B' thereto. More particularly, and without limiting the generality of the foregoing, the Respondent requires particulars of each and every material fact, action and omission upon which the Applicant intends to rely as constituting improper or irregular conduct, including the time when and the place where such acts and omissions occurred and the names of the persons who engaged in or committed them. Specifically, the Respondent requires particulars as follows:

- (i) The date upon which the alleged sale took place.
- (ii) The names and dates of the construction projects referred to at paragraph 12(g) of the application.

- (iii) The time or times when and the place or places the Respondent allegedly failed or refused to apply the terms of the collective agreement and the precise nature of 'work' such collective agreement allegedly covers, referred to at paragraph 12(h) of the application.
- (iv) The time or times when and the place or places where 'arrangements solely designed to impede the Applicant's bargaining rights' were made and the names of any persons alleged to have made such arrangements, referred to at paragraph 12(i) of the application.

If the Respondent is not promptly provided with particulars as demanded, the Respondent will request that the Board strike from the application any statements not particularized."

5. By letter dated October 4, 1981, counsel for the respondent repeated the demand for particulars as set forth above and also demanded particulars "in respect of precisely how it is alleged that the Respondents were 'at all material times carrying on associated or related activities or businesses under common control or direction', as stated at paragraph 6(1) to the Applications. More particularly, the Respondents require a precise statement of all material facts upon which the Applicant intends to rely as constituting common control or direction, as alleged, and the names of any persons in whom such common control or direction is alleged to reside."

6. By letter dated October 9, 1981, counsel for the applicant indicated that his client relies on sections 1(5) and 63(13) in response to the request for particulars and, without prejudice to that position, stated that "sufficient particulars are set out in Schedule 'B' of the Application with respect to the directors of the Respondents' and that "[a]ny other particulars would be within the realm of knowledge of the respondents themselves."

7. By letter dated October, 9, 1981, counsel for the respondents reiterated the demand for particulars and the intention of his clients to argue for dismissal of this application without hearing by way of preliminary submission.

8. In his preliminary submission to the Board, counsel for the respondents contended that this application should be dismissed without a hearing pursuant to section 46(1) of the Board's Rules of Procedure as (in his submission) the applicant has not made out a prima facie case for relief under section 63 or section 1(4) of the Act. He submitted, in the alternative, that each of the statements contained in the application which lack particularity should be struck from the application pursuant to Rule 47. In support of his position, counsel submitted that the reverse evidentiary onus under sections 1(5) and 63(13) only applies where there is "a properly pleaded and particularized allegation before the Board". He argued that the particulars demanded by the respondent are necessary to enable his clients to know the case which they have to meet and also to know the extent of their statutory obligation to adduce all facts within their knowledge that are material to the allegations. He also submitted that his clients should not be put to the expense of a protracted hearing to enable the applicant to engage in a "fishing expedition".

9. In response to those submissions, counsel for the applicant argued that Rule 47 does

not apply to an application under section 1(4) or section 63 since a finding of improper or irregular conduct by a respondent is not necessary to establish entitlement to relief under those provisions. It was his position that, for the evidentiary onus set forth in sections 1(5) and 63(13) to apply, it is sufficient that an applicant merely allege that a sale has taken place between specified parties or that common control or direction exists between them. He argued that the particulars requested are exclusively within the knowledge of the respondents and that the reverse evidentiary onus of sections 1(5) and 63(13) reflects that reality. He also argued, in the alternative, that the applicant has provided sufficient particulars in its application, which specifies the applicable sections of the Act, the names of the companies involved, the name of the common officer and director, and the relationship between the directors.

10. It was common ground among the parties that sections 1(5) and 63(13) of the *Labour Relations Act* place an evidentiary onus on respondents in proceedings under sections 1(4) and 63, which provide, in part, as follows:

“1(4) Where, in the opinion of the Board, associated or related activities or businesses are carried on, whether or not simultaneously, by or through more than one corporation, individual, firm, syndicate or association or any combination thereof, under common control or direction, the Board may, upon the application of any person, trade union or council of trade unions concerned, treat the corporations, individuals, firms, syndicates or associations or any combination thereof as constituting one employer for the purposes of this Act and grant such relief, by way of declaration or otherwise, as it may deem appropriate.

1(5) Where, in an application made pursuant to subsection (4), it is alleged that more than one corporation, individual, firm, syndicate or association or any combination thereof are or were under common control or direction, the respondents to the application shall adduce at the hearing all facts within their knowledge that are material to the allegation.

63(2) Where an employer who is bound by or is a party to a collective agreement with a trade union or council of trade unions sells his business, the person to whom the business has been sold is, until the Board otherwise declares, bound by the collective agreement as if he had been a party thereto and, where an employer sells his business while an application for certification or termination of bargaining rights to which he is a party is before the Board, the person to whom the business has been sold is, until the Board otherwise declares, the employer for the purposes of the application as if he were named as the employer in the application.

63(13) Where, on an application under this section, a trade union alleges that the sale of a business has occurred, the respondents to the application shall adduce at the hearing all facts within their knowledge that are material to the allegation.”

Also relevant to the disposition of the respondent's preliminary submissions are sections 46 and 47 of the Board's Rules of Procedure which provide, in part, as follows:

"46.1(1) Where an application or complaint does not, in the opinion of the Board, make out a *prima facie* case for the remedy requested, the Board may dismiss the application or complaint without a hearing and it shall in its decision state the reason for the dismissal.

47.-(1) Where a person intends to allege, at the hearing of an application or complaint, improper or irregular conduct by any person, he shall,

(a) include in the application or complaint; or

(b) file a notice of intention that shall contain,

a concise statement of the material facts, actions and omissions upon which he intends to rely as constituting such improper or irregular conduct, including the time when and the place where the actions or omissions complained of occurred and the names of the persons who engaged in or committed them, but not the evidence by which the material facts, actions or omissions are to be proved, and, where, he alleges that the improper or irregular conduct constitutes a violation of any provision of the Act, he shall include a reference to the section or sections of the Act containing such provision.

(2) Where, in the opinion of the Board, a person has not filed notice of intention promptly upon discovering the alleged improper or irregular conduct, he shall not adduce evidence at the hearing of the application of such facts, except with the consent of the Board and, if the Board deems it advisable to give such consent, it may do so upon such terms and conditions as it considers advisable.

(3) Where a statement in an application or complaint or in any document filed under these Rules in respect of the application or complaint is so indefinite or incomplete as to hamper any person in the preparation of his case, the Board may, upon the request of the person made promptly upon receipt of the application, complaint or document, direct that the information stated be made specific or complete and, if the person so directed fails to comply with the direction, the Board may strike the statement from the application, complaint or document.

(4) No person shall adduce evidence at the hearing of an application or complaint of any material fact that has not been included in the application or complaint or in any document filed under these Rules in respect of the application or complaint, except with the consent of the Board and, if the Board considers it advisable to give such consent, it may do so upon such terms and conditions as it considers advisable."

11. In *Canada Cement Lafarge Ltd. and Point Anne Quarry Company*, [1975] OLRB Rep. Jan. 5, the Board had before it one of the first applications in which sections 1(4) and 63 (which prior to the 1980 revision was section 55 of the Act) were invoked following the passage of what are now sections 1(5) and 63(13). In that case, the Board made the following observations concerning the purpose and effect of those provisions:

“11. Prior to the enactment of sections 1(5) and 55(13), certain threshold evidentiary difficulties faced an applicant attempting to invoke section 1(4) or section 55. For example, the issue under section 1(4), as to whether corporations carrying on related or associated activities or businesses should be treated as one employer, is dependent upon facts which lie peculiarly within the knowledge of the corporations concerned. The same is true where the sale of a business is alleged under section 55. Since the ultimate burden of proof lies with the applicant in such cases, it was necessary, prior to the amendments, for the applicant to subpoena officers or employees of the respondents in an attempt to prove its case. Failure to call any evidence was fatal to the applicant’s case: see *Super City Discount Foods Limited*, O.L.R.B. Monthly Reports, August 1969, p. 666. Thus, the applicant was in an anomalous position of having to rely upon evidence of persons adverse to the interest which it was asserting. Moreover, in determining how to proceed, the applicant faced several difficult decisions: who amongst a corporation’s various officers or representatives was in the best position to testify fully and accurately on all material aspects of the relationship or transaction in question; what documents, if any, should be subpoenaed; how could the subpoena for documents be cast in sufficiently broad terms to cover the appropriate material without it being struck out for lack of particularity? At the hearing, since the respondent’s officers were the applicant’s own witnesses, the applicant could not probe their testimony in the usual manner by cross-examination. Frequently, therefore, the applicant was left with evidence from a vague, reticent or ill-informed witness — a witness who, at least technically, was his own.

12. It is, we think, reasonable to assume that these and related problems gave rise to the enactment of sections 1(5) and 55(13). As we construe the amendments, the onus of adducing the material facts has now been placed upon the parties having knowledge of, and access to, those facts. What does this mean in practical terms? A basic question, and one raised directly by Mr. Dunn’s motion, is: what is meant by *all* material facts? Construed literally, it could, as Mr. Dunn contends, mean all facts conceivably bearing upon the particular issue in dispute. If that was the Legislature’s intention, a respondent’s ability to comply would ultimately depend upon the ingenuity and speculative talent of the applicant’s counsel. Hypothetically, a series of questions could be devised, the answers to which could conceivably be material. A witness’ inability to answer such inquires could then give rise to repetitive and, in theory, endless assertions that the respondent was failing to fulfil its statutory obligation.

13. In our view, the amendments are not intended to permit an applicant to engage in a fishing expedition of a sort suggested by that hypothesis. Where relief under section 1(4) and/or section 55 is claimed, we believe that the respondent’s obligation, must be sensibly delimited. In defining the obligation, some assistance is obtained by looking to Court practice in examinations for discovery in civil actions. Clearly,

the analogy is not perfect or complete: the purpose of pre-trial discovery in a civil suit is quite different, as is the rationale for restricting the ambit and nature of questioning on discovery. However, the analogy is instructive, especially where there are corporate parties, for the limited purpose of indicating who should be produced, the extent to which the person produced should prepare himself to testify, and the remedies, should the witness fail to supply information properly requested from him.

14. On an examination for discovery, the person being examined is bound to make reasonable efforts to inform himself of all matters material to the issue in question. In the case of a corporate officer, this entails acquainting himself of facts not within his personal knowledge which are within the knowledge of other officers, servants or agents of the corporation or which form part of the records of the corporation: *Bondar v. Usinovitch*, [1918] 1 W.W.R. 557 (Sask.); *Geddings v. C.N.R.*, (1919) 1 W.W.R. 909 (Sask. C.A.); *Star Electric Fixtures Ltd. v. Sussex Fire Insurance Co.*, [1936] O.W.N. 654 (S.C.); and, generally, *Homestead & Gale, Ontario Judicature Act and Rules of Practice*, vol. 2, p. 134.

Similarly, a party giving discovery is under duty to make a careful and diligent search of all relevant documents in his possession and to make diligent inquiries about all material documents which may be in the possession of others for him: *Price v. Price*, (1879), 48 C.J. Ct. 215.

Under the Supreme Court Rules of Practice, a corporate witness may be ordered to inform himself concerning questions properly put to him which he is unable to answer. The Court also has the power to grant leave to examine a second officer if the witness has failed to give to the party seeking it the information to which it is entitled.

15. We believe that similar principles and procedures should apply under section 1(5) and 55(13). The obligation to adduce material facts is upon the respondent, and the witness or witnesses chosen by it should tender their evidence-in-chief. Except in exceptional circumstances (e.g., where the respondent is unrepresented), we do not believe that it is desirable for the Board to conduct the inquiry. Nothing in the recent amendments causes us to disagree with the observation of the Board in the *Super City Discount Foods* case, *supra*, that 'It is not for the Board . . . to undertake an inquiry of its own in the matter.' There may be situations where members of the panel may wish to question witnesses to have testimony clarified or amplified. However, generally speaking it is desirable that the carriage of the proceedings be left to the parties.

16. Once the respondent has completed its evidence, the applicant may wish to contend that the initial obligation to adduce all material facts has not been met. In such cases, an applicant may, at that stage, ask the Board to direct compliance. In most instances, however, it would seem to us that the applicant should proceed with its cross-examination. If, in cross-examination, the witness is unable, or unwilling, to respond to question-

ing, and if the applicant can persuade the Board that the answer sought is likely to be material to the issue in dispute, the applicant is entitled to seek a direction from the Board requiring that the information be supplied, either by the witness informing himself or by the respondent producing the information through another witness. If the applicant completes its cross-examination without objection to the testimony given, it is reasonable to assume that it is content to accept the testimony of the particular witness as tendered. And when the respondent completes its evidence, and the case proceeds without objection from the applicant, the reasonable conclusion is that the applicant has waived any right to contend that the respondent has not fulfilled the obligation created by section 1(5) or section 55(13), as the case may be. It may be noted that there is nothing to prevent an applicant from calling evidence to add to, vary or contradict the testimony of the respondent's witnesses."

(See also *Richmond Insulation Company*, [1980] OLRB Rep. Oct. 1519, in which the Board applied the same principles and procedures which guided it in *Canada Cement Lafarge*.)

12. Counsel for the respondents referred the Board to a number of authorities concerning the purpose of particulars and the extent of a party's obligation to provide particulars under Rule 47. He relied extensively on *Racine, Robert and Gauthier Reg'd*, [1978] OLRB Rep. June 559, in which the Board referred to a number of its previous decisions relating to Rule 47. Those authorities indicate that the purpose of particulars is to ensure a fair hearing by avoiding prejudice, delay or embarrassment to the opposing parties by enabling them to know in advance what case they have to meet at the hearing. Particulars reduce the risk of opposing parties being taken by surprise and enable them to prepare for cross-examination of the witnesses called by the party alleging the improper or irregular conduct. Particulars also assist opposing parties to determine what witnesses they will need to have available in rebuttal. The *Racine* case also provides the following examples of considerations that are relevant in ruling on the sufficiency and adequacy of the particulars provided by an applicant:

"(1) Whether the allegations substantially identify and describe the offences alleged and indicate the acts or omissions and the time when and place where they occurred and give the names of the persons who committed or engaged in them;

(2) The knowledge or availability of knowledge possessed by the parties of the circumstances and details of the alleged violations;

(3) Whether the language of the allegations and the absence of certain particulars are likely to mislead, confuse or cause real prejudice to the opposite party in the preparation of its defence;

(4) Whether additional particulars sought or demanded are merely descriptive of the evidence by which they are to be proved rather than of the acts or omissions and the time when and place where they occurred and the names of the persons who engaged in or committed them;

(5) The nature and circumstances of the violations alleged;

(6) Whether particulars demanded are likely to be required by the party demanding them for the *bona fide* purpose of preparing his defence or whether they are more likely being demanded solely as a technical matter for the purpose harassing and embarrassing the applicant and to create delay in the disposition of the application.”

13. As contended by counsel for the applicant, neither section 1(4) nor section 63 requires a finding of anti-union motivation on the part of the respondents, or either of them. See, for example, *Brant Erecting and Hoisting*, [1980] OLRB Rep. July 945, at paragraph 12, in which the Board stated:

“Section 1(4) was enacted in 1971 and deals with situations where the economic activity giving rise to employment or collective bargaining relationships regulated by the Act, is carried out by, or through more than one legal entity. Where such legal entities carry on related business activities under common control or direction, the Board is empowered to pierce the corporate veil. Section 1(4) ensures that the institutional rights of a trade union, and the contractual rights of its members, will attach to a definable commercial activity, rather than the legal vehicle(s) through which that activity is carried on. Legal form is not permitted to dictate or fragment a collective bargaining structure; nor will alterations in legal form undermine established bargaining rights. In this respect the purpose of section 1(4) is similar to that of section 55 which preserves the established bargaining rights and collective agreement when a “business” is transferred from one employer to another. Section 55 has been part of the scheme of the Act since the mid 1960’s. Neither remedial provisions requires a finding of anti-union animus; their primary application is to *bona fide* business transactions which incidentally undermine or frustrate established statutory rights. . . .”

14. However, that is not to say that the existence of anti-union animus is irrelevant and cannot be alleged or proved in proceedings under section 1(4) or 63. One of the purposes of those provisions is to protect bargaining rights in the face of transactions motivated by a desire to undermine or circumvent bargaining rights. (See *Grand Valley Ready Mixed Concrete Supply Limited*, [1981] OLRB Rep. June 663, and *More Groceteria Limited*, [1980] OLRB Rep. Apr. 486). Thus, as noted in the *More* case, section 1(4) and 63 have an “unfair labour practice aspect”.

15. In cases in which an applicant under section 1(4) or section 63 does not allege an unfair labour practice aspect, Rule 47(1) would appear to be inapplicable since an application based upon a commercial transaction undertaken for bona fide business purposes would not involve “improper or irregular conduct” within the meaning of Rule 47(1). However, it appears that the Board would nevertheless be empowered by Rule 47(3), and by its power to control its own practice and procedure, to direct that a statement in the application be made specific or complete if the statement was so indefinite or incomplete as to hamper any party in the preparation of its case. Allegations, such as that contained in paragraph 12(i) of the instant application, which do involve improper or irregular conduct are clearly within the purview of

Rule 47(1) and must be particularized in accordance with that provision. However, as indicated above, in determining the adequacy of the particulars provided by an applicant or the specificity of statements contained in an application, the Board must have regard to all relevant circumstances, including the matters set forth in the *Racine, Robert and Gauthier Reg'd* case (*supra*). Of particular importance in cases under sections 1(4) and 63 is the limited knowledge available to unions concerning the details of a sale of a business, such as the date of a sale and the manner in which the disposition of the business was effectuated. Similarly, very limited information is generally available to unions with respect to the facts that are material to the issue of whether one or more firms are or were under common control or direction. If the firm is incorporated, a corporate search will reveal the date of corporation, the location of the head office, and the names of the directors and officers. Thus, in such circumstances, a union can reasonably be expected to set forth in its application information such as that specified in paragraph 12(a), (b), (c) and (d) of this application. (As noted by counsel for the applicant, the inclusion of the alleged date of incorporation of Expert (June 20, 1979) serves to indicate to the respondents that the maximum time frame covered by this application is approximately 27 months.)

16. By enacting sections 1(5) and 63(13) of the Act, the Legislature has recognized that most, if not all, of such facts lie within the exclusive knowledge of the respondents in proceedings under sections 1(4) and 63. As noted in *Woodway Structural Components*, [1971] OLRB Rep. Aug. 545, "in general, the effect of 'peculiar knowledge' is that it may mean that very little evidence is required to satisfy the evidentiary burden when it rests upon the party lacking such knowledge." Similarly, the Board is of the view that as regards particularity and specificity, the effect of "peculiar knowledge" is that very little is required to satisfy the requirement of providing particulars or specifics, when such requirement rests upon the party lacking such knowledge.

17. It is also relevant to note that the applicant alleges that each of the respondents carries on business in the construction industry. As noted by the Board in *Brant Erecting and Hoisting*, (*supra*), in the construction industry business may often be effectively transferred from one corporate entity to another without clear and concrete indicia of a disposition of the business since many construction industry employers do not have the permanence or investment in fixed plant and equipment characteristic of a manufacturing concern. The Board also stated in that case (at paragraph 13): "A small construction company can move from jobsite to jobsite or place to place, assembling tools, equipment and a labour force as required *after* it has made a successful bid. There may be no established economic organization, labour force or configuration of assets. A single principal may have several companies which are used, more or less interchangeably, so that the bidding is done and work performed through whichever company is convenient." Thus, the nature of the construction industry also militates against an unrealistically onerous approach to particularization of allegations in applications under sections 1(4) and 63 which pertain to employers in the construction industry.

18. For the foregoing reasons, the Board is of the view that an applicant under section 1(4) or 63 generally satisfies the requirements of fairness and natural justice implicit in Rule 47 by providing the information required by Form 21a (in the case of an application under section 63) or Form 21f (in the case of an application under section 1(4)). Moreover, even some of that information may not be required in the circumstances of a particular case; for example, as indicated above, the precise date of the alleged sale may well be unknown to, and

unascertainable by an applicant. Thus, an indication of the time frame to which the section 63 application pertains (such as the 27 month time frame implicit in the allegations in the present case) may suffice.

19. It is also important to note that the Board's jurisprudence under sections 1(4) and 63, including the *Canada Cement Lafarge* case (*supra*), provides respondents with a reasonably clear indication of the extent of their obligation to adduce evidence under sections 1(5) and 63(13). An applicant union that is aware of facts (material to its allegation that a sale has occurred or that the entities in question are or were under common control or direction) which it chooses not to specify in its application, runs the risk of prolonging the proceedings by providing a respondent with grounds for requesting an adjournment if it can satisfy the Board that it has suffered real prejudice as a result thereof.

20. Having regard to the submissions of the parties and the allegations contained in the application filed by Local 95 in this case, the Board is of the opinion that the application makes out a *prima facie* case for at least some of the remedies requested. We are also of the view that, with the exception of paragraph 12(h) and (i), the statements in the application are not so indefinite or incomplete as to hamper either of the respondent in the preparation of their respective cases or in the fulfilment of their statutory duties under sections 1(5) and 63(13). However, parts (h) and (i) of paragraph 12 do lack sufficient particularity to comply with Rule 47. Accordingly, if the applicant intends to rely upon those allegations, it is directed to furnish the respondents and the Board with a concise statement of the material facts, actions or omissions upon which it intends to rely in support of those allegations of improper or irregular conduct by the respondents, in accordance with Rule 47(1). The statement of material facts is to be provided, as directed, within 10 days of the date hereof, failing which paragraph 12(h) and (i) will be struck from the application.

21. The Christian Labour Association of Canada ("C.L.A.C."), filed an intervention in this matter in which it states that it has an interest in these proceedings because it has a collective agreement dated May 29, 1981, with Expert. The applicant challenges C.L.A.C.'s status to intervene in these proceedings and contends that C.L.A.C. must establish the validity of its collective agreement by proving that it was entitled, at the time the agreement was entered into, to represent the employees in the bargaining unit specified in the agreement. After hearing the submissions of the parties with respect to that issue, the Board indicated that it would hear the respondents' preliminary objections (as set forth above) and would permit Mr. Adema to make submissions with respect to them without ruling on the question of C.L.A.C.'s status to intervene in these proceedings.

22. In *The Ottawa Citizen, a Division of Southam Press Limited*, [1969] OLRB Rep. March 1268, the Board stated:

"4. It is a long established practice of the Board that where a collective agreement has been in existence for more than one year that such agreement is deemed to be a collective agreement within the meaning of section 1(1)(c) [now section 1(1)(e)] of The Labour Relations Act unless evidence is adduced which establishes otherwise. The onus of calling such evidence rests upon the party which challenges the status of the union that is a party to the collective agreement or challenges the status of the collective agreement itself.

5. The Board's practice in this regard is consistent with the provisions of section 45A [now section 60] of The Labour Relations Act which specifically provide that if a collective agreement is challenged during the first year of the period of time that the first collective agreement is in operation, the onus of establishing that the trade union was entitled to represent the employees in the bargaining unit at the time the agreement was entered into rests upon the parties to the agreement. It therefore follows that since this provision is restricted to the first year of operation of the first collective agreement between the parties, the Board's practice of requiring the person who challenges the status of a collective agreement which has been in existence for more than one year to establish the facts in support of its challenge is consistent with the provisions of section 45(1) of the Rules of Evidence."

(See also *Parkdale Wines Ltd.*, [1970] OLRB Rep. July 485, and *Standard Machine & Equipment Incorporated*, [1974] OLRB Rep. Nov. 819.)

23. In view of the applicant's challenge to C.L.A.C.'s status to intervene in these proceedings, and in view of the fact that the document in question has not been in existence for more than one year, the initial evidentiary onus is on C.L.A.C. to establish that it has status to intervene in these proceedings. If C.L.A.C. can establish that it has a collective agreement with Expert, then it would have status to intervene since its bargaining rights under that agreement could be affected by this application. Accordingly, the Board will afford C.L.A.C. — and the respondent Expert, if it seeks to uphold the validity of the document in question — an opportunity to adduce evidence in support of its assertion that it has a collective agreement, within the meaning of section 1(1)(e) of the Act, with Expert, including evidence that it represented employees of Expert in the pertinent bargaining unit at the time it entered into the agreement in question.

24. This matter is referred to the Registrar to be listed for continuation for the purpose of hearing the evidence and representations of the parties with respect to all matters arising out of, and incidental to, this application.

1119-81-R United Steelworkers of America, Applicant, v. Hall Engineering (Ontario) Limited, Respondent, v. Group of Employees, Objectors

Certification – Representation Vote – Employment having “agreement” with employee shop committee – Whether causing Board to exercise discretion to direct vote

BEFORE: E. Norris Davis, Vice-Chairman, and Board Members L. Hemsworth and A. Herskovitz.

DECISION OF THE BOARD; October 5, 1981

1. This is an application for certification.
2. The Board finds that the applicant is a trade union within the meaning of section 1(1)(p) of *the Labour Relations Act*.
3. Having regard to the agreement of the parties, the Board further finds that all employees of the respondent in Cambridge, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period constitute a unit of employees of the respondent appropriate for collective bargaining.
4. The list of persons employed within the bargaining unit was established at the hearing to be comprised of 37 employees. The applicant filed documentary evidence of membership on behalf of 24 persons in the bargaining unit. A statement of desire to not be represented by the applicant was filed on behalf of 19 employees and 7 of such employees were also persons claimed by the applicant to be members.
5. Oral testimony was received regarding the origination and circulation of the statement of desire from Mr. G. J. Gotby and also from Mr. Harold Hacking. Hacking is the sole inspector employed and as such reports directly to the general manager. The job of inspector is not one of the classifications included in a wage schedule to an agreement (which will be referred to later in more detail) between a Shop Committee and the respondent.
6. Mr. Gotby, who was the originator of the petition, testified as to having witnessed the signatures of four persons, one of whom was also claimed by the applicant as a member. He was also a signatory to the petition and not claimed by the applicant as a member. Mr. Hacking, who was also a signatory to the petition, and not claimed by the applicant as a member, testified to having witnessed the signature of one other employee. That other employee was not a person claimed as a member by the applicant. No evidence was tendered as to the circumstances under which the other signatories to the petition came to sign and the group of objectors therefore failed to provide the Board with evidence on which it would be satisfied as to the voluntariness of the actions of those other persons. The only evidence before the Board, therefore, was that one of the persons who was a member of the applicant had also signed the written statement of desire not to be represented by the union. Even if the Board assumed that the person had voluntarily signed the petition, more than fifty-five per cent of the employees in the unit are members and continue to support the application.

7. The respondent is a party to an agreement with the Employee Shop Committee dated March 11, 1981, and to cover a period from March 17, 1981, to March 16, 1982. The Agreement contains wage rates, vacation provisions and a number of other economic working conditions as well as provisions for a Safety Committee and a method of handling employee disputes. It is not contended that this document is a collective agreement within the meaning of the Act, nor that the Employee Shop Committee is a trade union within the meaning of the Act. The respondent seeks to call witnesses to establish facts surrounding the agreement and the employer-employee relationship and contends that such evidence would be relevant to the Board's exercise of discretion under section 7(2). The applicant objected to the introduction of such evidence.

8. The Board reserved its ruling in this regard and subsequent to the hearing asked that the respondent file a statement of the facts it wished to establish through evidence. The respondent, in its letter of September 18, 1981, has outlined those facts as follows:

- "1. The Respondent Company has been party to Agreements covering the terms and conditions of employment of its employees since 1974. Agreements have been negotiated with an Employee Shop Committee for each year since March, 1974.
2. The Shop Committee which represented the employees in the negotiations was freely selected by the employees without interference from or support from Management.
3. The negotiation of the Agreement has normally required several meetings. The usual practice has been for the Employee Shop Committee to present a set of demands to Management, those demands having been formulated in consultation with the employees. Meetings have been held with Management to discuss the demands and in the course of several meetings and Agreement has normally been reached. The Agreement has normally been taken back to the employee body by the Shop Committee representative in order to determine whether or not it was acceptable to the employees. Where it has been determined that the Agreement was unacceptable further negotiation meetings have been held in order to obtain an acceptable Agreement.
4. The Agreements negotiated in the matter described in paragraph 3 have normally included provisions covering the following:
 - (a) duration of the Agreement;
 - (b) wage rates;
 - (c) statutory holidays;
 - (d) provisions for meal payment on out-of-town calls;
 - (e) provisions for premium payment on service calls;

- (f) provision for a safety committee;
- (g) provision for representation of employees in the event of a disagreement;
- (h) provision for payment of employees on first day of accident;
- (i) provision for minimum payment in the event of call-in;
- (j) vacation provision;
- (k) bereavement pay provision;

In addition to the matter referred to above in more recent years negotiations have resulted in a more elaborate welfare benefit program which has been included in the Agreement.

5. During the life of the Agreements referred to above representatives of the Company and representatives of the Shop Committee have met to deal with complaints relating to Company practices or the treatment of employees. In some cases the complaints have been resolved with an Agreement in writing signed by representatives of Management and the Shop Committee.
6. The most recent Agreement between the Respondent Company and the Employee Shop Committee was made on March 11, 1981 and covers the period March 17, 1981 to March 16, 1982. A copy of this Agreement was forwarded to the Board with the Respondent's reply to the Application.
7. The employees which have been covered by the Agreements referred to above are the same employees which the Applicant Union seeks to include in the bargaining unit."

9. The applicant at the hearing sought an adjournment on the grounds that it was not prepared to deal with the issue being raised by the respondent. The Board, with Board Member A. Hershkovitz dissenting, refused to grant an adjournment to the applicant. The adjournment was requested on the grounds that the applicant had assumed that the existence of the agreement of March 11, 1981 raised in Appendix "A" was being raised as a bar to the timeliness of this application. The applicant requested reasons in writing for the Board's ruling. The Board, in making its ruling, was of the opinion that the respondent's reply fully disclosed the issue of the agreement and that the respondent by striking out paragraph 9 of the Reply form as not being applicable, made it abundantly evident that there was no allegation of an existing collective agreement which would make it a bar to the current application. It is the Board's opinion that parties appearing before the Board have the responsibility of coming prepared to make representations as to what conclusions the Board should arrive at in respect to the evidence adduced.

10. The applicant also argued that it did not lie in the mouth of the respondent to call evidence which related to the wishes of employees, but that this was a matter solely for the Shop Committee or individual employees. The applicant further argued that in any event the proposed evidence could not cast doubt on the strength of the membership evidence filed by the applicant as indicative of the wishes of the employees and was therefore irrelevant.

11. It was the respondent's position that as a party to a document it had a right to lead evidence in respect to that document and, that the evidence would demonstrate a long history of relationship which had the effect of clouding the representation issue and should cause the Board to exercise its discretion in ordering a vote to ascertain the true wishes of the employees.

12. The Board is of the opinion that the issue is one which the respondent clearly has an interest in raising on its own behalf and should not be precluded from doing so, if the matter is considered to be relevant to the exercise of the Board's discretion. In the instant case the applicant has established unequivocal evidence of membership in excess of 55 per cent. Section 7(2) of the Act provides,

“If the Board is satisfied that not less than 45 per cent and not more than 45 per cent and not more than 55 per cent of the employees in the bargaining unit are members of the trade union, the Board shall, and if the Board is satisfied that more than 55 per cent of such employees are members of the trade union, the Board may direct that a representation vote be taken.”

It is clear from that section that despite the membership strength of an applicant, a discretion is provided to the Board to direct a representation vote. The Board in exercising that discretion will consider, for example, whether there are circumstances which render the membership evidence equivocal as demonstrating the wishes of employees and, if it so determines, will direct the gathering of additional evidence of such wishes through the conduct of a representation vote. (See *Primo Importing and Distributing Co. Ltd.*, [1981] OLRB Rep. July 953. In the present case, if we were to accept the statement of facts as provided by the respondent as having been proven we would conclude that they would not cause us to exercise that discretion. The facts as outlined establish that for a number of years there has been a form of employee representation short of a collective bargaining relationship. We can draw no inference solely from the past participation of employees, however long, in a regime of employee representation which is in any way inconsistent with those employees now wishing to engage fully in collective bargaining through a bargaining agent of their choice.

13. The respondent argued that the situation disclosed by its statement of facts was analogous to where an application for certification is made by a trade union in respect to a bargaining unit already represented, by way of voluntary recognition, by a bargaining agent and pointed out that in such circumstances the Board has exercised its discretion to conduct a representation vote giving employees a choice between the two bargaining agents. The respondent, however, conceded that in the instant case if a vote were conducted only the applicant's name should be on the ballot.

14. We see no parallel between the situation cited by the respondent and the present case. The existence of an incumbent bargaining agent at a time of an application for certification by a rival trade union raises the issue not of whether the employees wish to be

represented in collective bargaining by a trade union, but as to which trade union is to be selected for that purpose. In the case before us there is no competition between trade unions. The sole issue is whether the applicant has demonstrated membership support such as entitles it to be certified under the statute.

15. For all of the foregoing reasons, the Board is of the opinion that the evidence proposed to be called by the respondent is not relevant to the exercise of the Board's discretion under section 7(2) of the Act. The Board therefore declines to direct a representation vote.

16. The Board is satisfied on the basis of all the evidence before it that more than fifty-five per cent of the employees of the respondent in the bargaining unit at the time the application was made, were members of the applicant on September 2, 1981, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of *the Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

17. A certificate will issue to the applicant.

**2759-80-R Retail, Wholesale and Department Store Union,
AFL:CIO:CLC, Applicant, v. K-Mart Canada Limited, Respondent.**

Bargaining Unit – Whether office and clerical staff excluded from unit – Whether Board's practice of excluding office employees in manufacturing industry applicable in department stores

BEFORE: R. A. Furness, Vice-Chairman, and Board Members B. Lee and J. Wilson.

APPEARANCES: *H. Buchanan, George Ross, Gordon D. Reekie and Carole Currie for the applicant; R. A. MacDermid, C. A. Cumiskey and Catherina Spoel for the respondent; Helen McBennett and June MacLeod on their own behalf as employees.*

DECISION OF THE BOARD; October 23, 1981

1. This application for certification was filed on March 18, 1981, and the applicant requested that a pre-hearing representation vote be taken. In a decision dated April 2, 1981, the Board directed the taking of a pre-hearing representation vote. Paragraphs 5, 6, 7, 8 and 11 of the decision dated April 2, 1981, read as follows:

5. The Board directs, therefore, that a pre-hearing representation vote be taken of the employees of the respondent in voting constituency #1 consisting of:

All employees of the respondent at its K-Mart Store in St. Catharines, Ontario save and except department managers, persons above the rank of department manager, management trainees, pharmacists, office and clerical staff, persons regularly employed

for not more than twenty-four hours per week, and students employed during the school vacation period.

6. The Board directs that should the following persons, or any of them, who are office and clerical staff present themselves at the polling station, they shall be permitted to vote and their ballots shall be segregated and not counted pending further direction by the Board:

J. Adams	V. Kalagian
B. Bechard	J. Kolodziejczak
R. Burdio	B. Searle
M. Hartley	L. Shaver
M. Huckla	E. Valliere

7. The Board further directs that a pre-hearing representation vote be taken of the employees of the respondent in voting constituency #2 consisting of:

All employees of the respondent at its K-Mart Store in St. Catharines, Ontario regularly employed for not more than twenty-four hours per week and students employed during the school vacation period, save and except department managers, persons above the rank of department manager, management trainees, pharmacists, and office and clerical staff.

8. The Board directs that should L. Moskal, an office and clerical employee, present himself at the polling station, he shall be permitted to vote and his ballot shall be segregated and not counted pending further direction by the Board.

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11. The Board directs that both ballot boxes be sealed following the taking of the vote and that this matter be listed for hearing on the earliest available date thereafter. The purpose of the hearing will be to receive the evidence and argument of the parties on the issue of whether office and clerical staff are to be excluded from the bargaining unit as proposed by the applicant, whether the bargaining unit should be described, as agreed by the parties, in terms of all employees of the respondent at its *K-Mart Store* in St. Catharines, Ontario and to deal as well with any other matters which, at the time, are outstanding.

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3. The pre-hearing representation votes were conducted by the Board on April 10, 1981. On April 14, 1981, the Board received a letter from Mrs. MacLeod, Mrs. McBennett and seven other persons who purported to be employees of the respondent in St. Catharines. In this letter the writers complained about the methods used to form a union. The letter reads in part:

We feel the methods used to form a Union are atrocious in that they have used harrassment, coercion, intimidation including soliciting by use of a flyer on a car windshield thirty minutes after the Labour Board deadline of twelve midnight.

We agree Union members should be given scope to form a Union, but what we have been subjected to is downright ridiculous and might we add — illegal. Surely a simple vote yes or no should suffice.

We have no proof our secret ballot will be a success to either side, as the people they coerced were followed constantly e.g. driven to and from work, intimidation of students and no shortage of Union money to cover lunches, meetings, refreshments, etc., as openly admitted by some of our workmates. We were also harrassed by Union members of Dominion Foods. We would also add that as employees opposing the Union, we hired a hall to obtain signatures as advised by the Labour board; and at all three of the meetings, Union members or their husbands sat watching who approached our meetings.

We feel all this is unfair as we could not receive any help or advice from the Management in any shape or form, since this is a Labour Board ruling.

We are aware that the secret Ballot will decide the consequences, but feel the Labour Board of Ontario should be made aware of the tactics used in forming a Union, before the results of the Ballot are known.

We are writing this on behalf of a good majority of the staff who feel as we do.

Yours faithfully

(nine signatures)

4. This application came on for hearing on May 11, 1981. On that occasion, Helen McBennett and June MacLeod appeared and stated that they felt their rights had been infringed and that their letter set forth their concerns. They agreed, however, that the pre-hearing representation vote had been conducted fairly.

5. The parties were unable to agree on the matters set forth in paragraph 11 of the decision of the Board dated April 2, 1981. However, it was agreed that the respondent would prepare a draft of an agreed statement of fact with respect to the eleven persons in dispute and would then send the draft statement to the applicant. The applicant and the respondent agreed that they would try and finalize the statement of fact and that if they were unable to finalize an agreed statement of fact a Labour Relations Officer could be appointed. Helen McBennett and June McLeod agreed with this method of proceeding and informed the Board that they were not concerned with this aspect of the application. The Board also ruled that since there would be a delay of approximately one month, Helen McBennett and June McLeod would be allowed one month (until June 11, 1981) to file particulars of their complaints and be prepared

to adduce evidence if they wished the Board to entertain their complaints. No such particulars were received by the Board.

6. Subsequently, an agreed statement of fact was reached. Helen McBennett and June McLeod did not file particulars of their complaints. The next hearing of this application was on August 4, 1981. At the hearing on August 4, 1981, the applicant and respondent were represented. Helen McBennett and June McLeod were present during the hearing but did not complete an appearance information sheet and did not sit at the places provided for counsel and representatives. When the Board inquired whether anyone other than the applicant and the respondent wished to appear and address the Board on any aspect of this application there was no response. At this point the Board dismissed the matters raised by Helen McBennett and June McLeod in their letter which had been received by the Board on April 14, 1981.

7. The agreed statement as to facts reveals that Jackie Adams, Virginia Kalagian and Joan Kolodziejczak work together to enable the store to keep a record of its merchandise. Their titles are office merchandise co-ordinator, area H (Hardlines) merchandise co-ordinator and area T (Textiles) co-ordinator, respectively. Each K-Mart is divided in half. One half of the premises consists of textile goods (such as ladies' dresses, men's suits, etc.). The other half consists of hardlines (such as sporting goods, toys, hardware, furniture, etc.). In each department in each of these areas, there are looseleaf books which contain a record of merchandise on hand for that department and known in the store as a catalogue. By referring to this catalogue, each person working in each department will be able to determine the availability of particular items of merchandise which may be on hand.

8. Ms. Kalagian in area H and Ms. Kolodziejczak in area T keep these books up to date for each department. To accomplish this, they must go to the sales floor and make entries into these books. Periodically, they will collect the books for the purpose of updating them by adding further looseleaf sheets or catalogue information known as Return Sheets containing information on merchandise which has been ordered or has been delivered to the store through the head office of the respondent. In addition, they must also periodically check the stockroom to determine whether or not merchandise in the quantities ordered by the store has been received.

9. Although Ms. Kalagian and Ms. Kolodziejczak share an office with Ms. Adams and Mr. J. Fafard, the store's merchandise manager; Ms. Kolodziejczak estimates she spends ninety per cent of her time outside that office on the sales floor attending to her duties in the various departments in her area. Ms. Kalagian estimates she spends about ninety-nine per cent of her time outside that office on the sales floor in the various departments in her area attending to her duties. Ms. Kalagian and Ms. Kolodziejczak are asked to straighten up merchandise being displayed in the various departments in the respective areas in the same manner as any sales clerk would in order to keep up the appearance of the merchandise on display. They also assist in setting out on sales counters merchandise in the same way any other sales clerk would. Ms. Kalagian was hired on August 18, 1969, as a full-time clerk in the furniture department. On September 18, 1969, she became merchandise co-ordinator for the Hardlines area. Ms. Kolodziejczak was hired on June 21, 1971, and placed in her present position upon hiring.

10. Ms. Adams receives, dates and sorts all mail by departments and distribute it to Ms. Kalagian and Ms. Kolodziejczak and the assistant managers. She also files original copies of

all mail, such as Return Sheets and Information Results, by the date upon which they were returned to the head office. Ms. Adams makes all necessary corrections in catalogues to Ms. Kalagian and Ms. Kolodziejczak to facilitate the changing of store orders and the counting and recording of merchandise in each department on the sales floor. She collects information relating to selling price changes arising through comparisons of competition prices and records these on the appropriate form for the use of the sales floor and the head office of the respondent. Ms. Adams obtains catalogues of merchandise to be sent to the various departments on the sales floor in order that the merchandise can be counted and the catalogues returned on schedule. She follows the schedule set up by the merchandise manager and she notifies him if there is any difficulty in following the schedule. As part of her duties, she completes a percentage check of stock on a monthly basis, maintains a list of all stock counts and merchandise policies to be followed and notifies the merchandise manager if there are any problems or tardiness encountered in this regard. Ms. Adams has been an employee of K-Mart since August 18, 1969, and has been an employee of the Kresge store chain and has been employed with the respondent in its Kresge stores since 1950.

11. Ms. Adams, Ms. Kalagian and Ms. Kolodziejczak share the same lounge and cafeteria facilities as are used by the employees in the bargaining unit who are not contested by the parties. The benefits and general conditions of employment they receive are the same as the employees in the bargaining unit who are not contested by the parties except that they receive approximately twenty-five cents an hour more than the employees in the bargaining unit who are not contested by the parties.

12. Barbara Searle is employed as the price list correction person and her main function is to update catalogue prices, to update prices at counter and stockroom level within the store by recording quantities and prices on appropriate forms and by marking the merchandise to the new price. In the performance of her duties, she estimates that she spends approximately ninety-nine per cent of her time on the sales floor in the various departments dealing with staff in those departments and with the merchandise on display with respect to the duties she is required to perform. Ms. Searle fills merchandise counters on the sales floor and also straightens up merchandise on display on the sales floor. She reports directly to Mr. Fafard, the merchandise manager. Ms. Searle was first employed on September 2, 1969, as a part-time cashier. Before she assumed the duties of the price list correction person, she worked in the store's credit office. Ms. Searle became the merchandise co-ordinator for the store on May 25, 1976, and became the price list correction person on September 13, 1979.

13. Bev Bechard is employed as the advertising person and was first hired on September 4, 1969, as a clerk in the Ladies' Wear Department. She worked in that position until November 23, 1978, when she became the advertising person. Ms. Bechard's primary responsibility as the advertising person is to ensure that the advertising materials prepared by the head office are given to and properly displayed by the newspapers in the St. Catharines area. In addition, she is required to make sure that the merchandise which is the subject matter of the advertisement is available for display and sale at the store. In doing so, Ms. Bechard follows a rigidly prescribed procedure established by the respondent's head office in Toronto and reports to Mr. Fafard, the merchandise manager. When the store runs an advertisement in a local newspaper, a part of her duties is to prepare advertisements which are to be read over the store's public address system in accordance with the prescribed procedure. Ms. Bechard will deliver the advertisement to the person working on the service desk which is located at the front of the store immediately opposite the entrance doors and beside the checkout cashiers.

The person at the service desk will read the announcements to the customers throughout the day. Part of her duties require her to set up the displays of the advertised merchandise, usually in the main isle of the store and on counter ends. Ms. Bechard ensures that the merchandise is brought on to the floor and displayed in a fashion to attract the buyers' attention.

14. In substance, the duties performed by Ms. Bechard as the advertising person are very comparable to a sales clerk. While a sales clerk on the sales floor may perhaps deal directly with the public with respect to advising them as to the location of merchandise on display, generally the sales clerks will be responsible for the display and presentation of merchandise in their departments. Ms. Bechard's responsibilities are to arrange and display the merchandise which is on sale and to make sure that sufficient quantities are available. When the store is extremely busy, she will frequently assist the cashiers by wrapping customers' packages at the checkout area. While she has an office, Ms. Bechard estimates that she spends twenty or more hours per week outside her office engaged in activities on the sales floor, counting merchandise on hand, arranging for displays, arranging for signs with respect to the merchandise on sale and for checking for merchandise on hand in the area of the stockroom assigned for advertised merchandise. She also spends time on the floor filling the special advertised displays as merchandise is sold. Ms. Bechard is subject to the benefits and general conditions of employment as the employees in the bargaining unit who are not contested by the parties except that she receives an additional twenty-five cents an hour.

15. Mary Hartley is employed as the general office clerk and has been employed by the respondent in that capacity since February 3, 1971. Before assuming that position she worked for the respondent's Kresge stores since October 19, 1948. Her responsibilities are generally to co-ordinate the work load of the general office. Ms. Hartley is responsible for all non-merchandising expense invoicing (e.g., a bill from a local plumber or electrician) and records such disbursements in an invoice register. She prepares weekly and monthly reports on such items as total sales, gross profits, running expenses and estimates the operating profit of the store. Ms. Hartley does not spend any of her time working on the sales floor.

16. Marj Huckla is employed as the payroll/invoice clerk and has been employed in that capacity by the respondent since December 1, 1969. The payroll sheet relating to the staff of the store comes in from the respondent's head office in Toronto and indicates the names of the employees, codes related to the employees and their social insurance numbers. Ms. Kuckla is required to make a record of the actual hours worked by each employee from their time cards and enter the hours together with the amount of pay each employee has earned, gross pay, deductions and net pay on the payroll sheet. She also prepares the employees' pay envelopes and a salary analysis or weekly salary cost to sell summary for the store. The number of employees employed in the store are broken down into categories and the salary costs with the employment of those employees are compared with total revenues for the store. The figures so derived are compared by Ms. Huckla to the corresponding figures for the same week in the previous year. She assists in the processing of invoices received from various manufacturers for merchandise forwarded and also assists in the cash office by double checking bank deposits.

17. Eleanor Valliere is employed as the accounts payable clerk. She commenced her employment with the respondent on November 18, 1972, as a part-time sales clerk in the Ladies' Wear Department. On February 8, 1973, she was transferred and became a full-time employee in the stockroom. On July 11, 1978, she became a temporary merchandise co-

ordinator. On July 25, 1978, she returned to the stockroom as a full-time employee and on January 3, 1980, she assumed her duties in the general office. As part of her duties, Ms. Valliere receives invoices from various manufacturers which supply merchandise to the store. When the merchandise is received, the employees in the stockroom circle the quantity received on the advice received from the manufacturer and the advice is then sent back to the merchandise co-ordinators who in turn pass it on to Ms. Valliere who records that the merchandise has been received. This record is then sent to the head office and indicates the merchandise ordered and delivered and the price and amount owing. She also assists in the cash office when required. Throughout the last twelve months, Ms. Valliere has worked on the sales floor in the Hair Goods Department every Wednesday. While performing this job she fills the merchandise counters, straightens up merchandise on display, counts merchandise on hand and prepares suggested orders for the merchandise as would any of the employees in the bargaining unit who are not contested by the parties.

18. Rose Burdio was employed on May 19, 1978, as a part-time cashier, on October 4, 1979, in part-time employment in the cash office and on June 26, 1980, as full-time in the cash office. She commenced pregnancy leave on May 13, 1981. Lynn Shaver was employed on October 3, 1979, as a part-time sales clerk in the Jewellery Department, on November 20, 1980, as temporary full-time in the Health and Beauty Department and on December 11, 1980, as full-time in the cash office. As cash office clerk, Ms. Shaver picks up the money from cash registers and records and balances those amounts. She also prepared the change funds for the following day, records any register errors and discrepancies and prepares a weekly cash report. With the approval of the manager she dispenses amounts to cover incidental expenses. Ms. Shaver also prepares the bank deposits which must be verified by a second person, usually one of the employees from the general office or the cash office.

19. The general office and cash office employees share the same lounge and cafeteria with all the other employees in the store and are subject to the same wage schedule, benefits and conditions of employment as the employees in the bargaining unit who are not contested by the parties except that they receive approximately twenty-five cents an hour more. The schedules are as follows:

Schedules:

Mary Hartley, Eleanor Valliere (40 Hours)

Monday to Friday 9:00 a.m. — 6:00 p.m.

Mary Huckla (30 Hours)

Monday 9:00 a.m. — 1:00 p.m.

Tuesday and
Wednesday 9:00 a.m. — 2:00 p.m.

Thursday and
Friday 9:00 a.m. — 6:00 p.m.

Lynn Shaver (40 Hours)

Monday to Friday 9:00 a.m. — 6:00 p.m.

Works alternate Monday and Saturday

Saturday Hours 8:30 a.m. — 5:30 p.m.

Rose Burdio (31 Hours)

Monday/Tuesday/
Wednesday 9:00 a.m. — 2:00 p.m.

Thursday/Friday 9:00 a.m. — 6:00 p.m.

Works alternate Monday and Saturday

Saturday Hours 8:30 a.m. — 5:30 p.m.

20. Lillian Moskal was employed on October 23, 1971, as a part-time employee in the cash office. She picks up money from cash registers, records and balances these amounts and prepares change funds for the following day. Ms. Moskal records register errors and discrepancies and with the approval of the manager she dispenses amounts to cover incidental expenses. She also prepares bank deposits which must be verified by a second person. Her schedule is as follows:

Schedule

Saturday 9:00 a.m. — 6:00 p.m.

Tuesday 9:00 a.m. — 2:00 p.m.

Present schedule due to Pregnancy of R. Burdio

Monday 9:00 a.m. — 2:00 p.m.

Tuesday Off

Wednesday 9:00 a.m. — 2:00 p.m.

Thursday 9:00 a.m. — 6:00 p.m.

Friday 9:00 a.m. — 2:00 p.m.

Saturday 8:30 a.m. — 6:00 p.m.

During this period she assists with Weekly Balance and preparation of appropriate forms.

21. The respondent argued that the persons who are in issue have been characterized as office employees and referred to circumstances where the Board had included office and sales employees in the same bargaining unit. The respondent stressed that the persons in issue form

part of a team and deal with various persons in the store. Various aspects of their work, such as the straightening up of merchandise was comparable to the work of sales clerks. The respondent also drew analogies with plant clericals and pointed to the line of progression from the position of sales clerks to the positions occupied by the persons who are in issue.

22. The respondent referred to the four office workers and argued that they receive the same conditions of employment as the other employees in the store. The respondent also referred to three certificates which had been issued by the Board to the applicant with respect to the respondent's operations in Sault Ste. Marie. These three certificates referred to the following three bargaining units: (i) office and clerical employees, (ii) all employees excluding office and clerical employees and employees regularly employed for not more than twenty-four hours per week and (iii) all employees regularly employed for not more than twenty-four hours per week. These certificates were issued by the Board in 1968 and 1969. Over a period of time, a collective agreement has been negotiated which covers all of the employees. The respondent also referred to a certificate which the Board issued with respect to its operations in Windsor, where the office staff was included in a bargaining unit with sales employees. Reference was also made to a recent decision of the Board where the Board in a comparable situation included office and sales employees in the same bargaining unit in the respondent's store in Peterborough. See *K-Mart Canada Limited*, [1981] OLRB Rep. Jan. 60.

23. The applicant referred to the hourly wage rate differential of twenty-five cents and to the scheduling as a difference between the sales persons and the persons who are in dispute. The applicant agreed with the respondent's remarks concerning its operation at Sault Ste. Marie.

24. In *K-Mart Canada Limited, supra*, the Board expressed the view that in the circumstances of a discount store, such as the respondent's store, a relatively small group of office staff should not be excluded from a bargaining unit that would encompass all other employees. In applications for certification which are made with respect to manufacturing operations, there is usually a clear line of demarcation between the functions and community of interest of production and maintenance workers on the one hand and office workers on the other hand. In such manufacturing operations, production and maintenance employees are included in one appropriate bargaining unit and office or office and sales employees are included in another appropriate bargaining unit. In sales and service operations these lines of demarcation are less clear than they are in manufacturing operations. For example, in *Leon's Furniture Limited*, [1976] OLRB Rep. May 232, the Board included office, clerical and sales employees in one bargaining unit in a retail furniture outlet; and in *Jewish Vocational Service of Metropolitan Toronto*, [1977] OLRB Rep. Nov. 754, the Board included office and clerical workers, technical workers and professional workers in one bargaining unit in an organization engaged in social services.

25. In the instant application, Ms. Kalagian and Ms. Kolodziejczak spent most of their time on the sales floor and Ms. Kalagian reached her present position after commencing employment as a sales clerk. They share an office with Ms. Adams and the merchandise manager and are closely associated in their work with the sales clerks and Ms. Adams. The three co-ordinators share the same lounge and cafeteria facilities as are used by the employees in the bargaining unit who are not contested by the parties and the benefits and general conditions of employment they receive are the same as the employees in the bargaining unit except that they receive approximately twenty-five cents an hour more than these employees.

Having regard to the nature and location of the work performed by the three co-ordinators and to the presence of a line of advancement from sales clerk to co-ordinator, we find that there is a functional integration between the co-ordinators and the sales clerks and that they enjoy a community of interest. We therefore include these three co-ordinators, Adams, Kalagian and Kolodziejczak in the bargaining unit.

26. Ms. Searle, the price list correction person, spends virtually all of her time on the sales floor and deals with the staff in the various departments and with the merchandise on display to the extent of filling and straightening up the merchandise on display. Having regard to the nature and location of the work she performs, we find that there is a functional integration between the price list correction person and the sales clerks and that they enjoy a community of interest. We therefore also include Ms. Searle in the bargaining unit.

27. Ms. Bechard, in addition to her duties as the advertising person, ensures that the merchandise which is the subject of the advertisement is available for display and sale. Part of her duties require her to set up the displays of the advertised merchandise on the sales floor. Her duties are very comparable to a sales clerk and when the store is extremely busy she will frequently assist the cashiers by wrapping customers' packages at the checkout area. She spends more than half of her time on the sales floor outside her office engaged in various activities such as counting merchandise, arranging displays and signs and checking merchandise on hand. Ms. Bechard is subject to the same wage schedule, benefits and general conditions of employment as the employees in the bargaining unit who are not contested by the parties except that she receives an additional twenty-five cents an hour. Having regard to the nature and location of the work performed by Ms. Bechard, we find that she enjoys a functional integration and a community of interest with the sales clerks. We therefore include the advertising person in the bargaining unit.

28. Ms. Hartley, Ms. Huckla and Ms. Valliere are employed as general office clerk, payroll/ invoice clerk and accounts payable clerk, respectively. They perform a variety of tasks and while they perform essentially clerical work there is little indication that the community of interest which they share with each other is greater than the community of interest which they share with the sales clerks. Ms. Valliere progressed from her initial employment as a part-time sales clerk to her present position. In addition, Ms. Valliere is closely concerned with the receipt of merchandise and has during the past twelve months worked in the Hair Goods Department on every Wednesday. Ms. Valliere fills the merchandise counters, straightens up merchandise on display, counts merchandise on hand and prepares suggested orders for the merchandise as would any of the employees in the bargaining unit. On balance, we find that Ms. Valliere enjoys a greater community of interest with the sales clerks than she does with the other clerks and is accordingly included in the bargaining unit.

29. Ms. Hartley and Ms. Huckla enjoy the same conditions of employment as the cash office employees, Ms. Burdio, Ms. Shaver and Ms. Moskal and the other employees in the store. They share the same lounge and cafeteria and are subject to the same wage schedule, benefits and conditions of employment except that they receive approximately twenty-five cents an hour more. While their schedules are different in some respects the variations are not such as to set any one employee apart from any other employee. In considering whether the employees referred to in this paragraph ought to be included in either the full-time or part-time bargaining units, in addition to considering the community of interest, the Board considers the viability of a bargaining unit which they might otherwise form as well as the arguments in

connection with the fragmentation of the work force into various bargaining units. See *Ponderosa Steak House*, [1975] OLRB Rep. Jan. 7. In the circumstances of this application, the cash office employees do not constitute a viable bargaining unit separate and apart from the other employees. We therefore include Ms. Hartley, Ms. Huckla, Ms. Burdio and Ms. Shaver in the full-time bargaining unit and Ms. Moskal in the part-time bargaining unit.

30. The Board therefore finds that all employees of the respondent at its K-Mart stores in St. Catharines, save and except department managers, persons above the rank of department manager, management trainees, pharmacists, persons regularly employed for not more than twenty-four per week and students employed during the school vacation period, constitute a unit of employees of the respondent appropriate for collective bargaining (hereinafter referred to as bargaining unit #1).

31. The Board therefore further finds that all employees of the respondent at its K-Mart stores in St. Catharines who are regularly employed for not more than twenty-four hours per week and students employed during the school vacation period, save and except department managers, persons above the rank of department manager, management trainees and pharmacists, constitute a unit of employees of the respondent appropriate for collective bargaining (hereinafter referred to as bargaining unit #2).

32. The applicant filed evidence of membership of the type referred to at the meeting convened by the Labour Relations Officer on behalf of twenty-two of the fifty-nine persons in bargaining unit #1 and on behalf of twenty-four of the forty persons in bargaining unit #2.

33. The Board directed the pre-hearing representation votes and the applicant had the requisite number of members pursuant to section 9(2) of the Act among the employees in the voting constituencies defined in paragraphs five and seven of the decision of the Board dated April 2, 1981.

34. The Board directs the Registrar to cause the ballot boxes to be unsealed and to cause the ballots to be counted, including the segregated ballots of the ten persons referred to in paragraph six in the decision of the Board dated April 2, 1981, with respect to bargaining unit #1. The Board further directs the Registrar to cause the segregated ballot of Lillian Moskal to be counted with respect to bargaining unit #2.

35. The matter is referred to the Registrar.

2403-80-U William R. Stewart, Amarnath Bhatia, John McDougall, Ed Northcott and Dale Wendover, Complainants, v. Teamsters Union, Local 419, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Respondent, v. **K-Mart Distribution Centre**, Intervener.

Duty of Fair Representation – Duty to Bargain in Good Faith – Ratification Vote – Unfair Labour Practice – Employees narrowly rejecting employer offer recommended by union – Union signing nevertheless – Union decision influenced by history of bargaining – Whether arbitrary or bad faith – Whether section 72 making results of ratification vote binding on union – Whether employees having standing to allege bad faith bargaining

BEFORE: R. O. MacDowell, Vice-Chairman and Board Members F. W. Murray and D. B. Archer.

APPEARANCES: *J. P. Wearing for the Complainants, Harold F. Caley for the Respondent, and R. J. Drmaj for the Intervener.*

DECISION OF THE BOARD; October 20, 1981

1. This is an application under section 89 of the *Labour Relations Act*. The complainants are a group of employees employed by K-Mart Limited and currently represented for collective bargaining purposes by Teamsters Local 419. Local 419 is a composite Local of some 5,000 members embracing a number of disparate bargaining units. It is alleged that the Union has contravened, *inter alia*, sections 15, 72 and 68 of the *Labour Relations Act*. There are no allegations of misconduct levelled against K-Mart; however, since the company was potentially affected by this proceeding, it was added as an interested party and extended a full opportunity to participate.

2. The principal allegation against the union can be stated quite simply. Following its certification and protracted negotiations, K-Mart proposed terms of settlement which would form the basis for a 3 year agreement. A narrow majority of the employees in the bargaining unit (i.e. 18 to 17) rejected those terms. Nevertheless, the union agreed to accept the employer's position, and conclude an agreement on that basis, rather than call a strike, continue what it considered to be fruitless negotiations, or abandon the bargaining unit altogether. The complainants characterize this decision as "arbitrary" and "flaunting the will of the majority"; but the situation is more complicated than that. The union's decision was not taken lightly, and in order to understand its motivation, it is necessary to appreciate the entire collective bargaining context. It will be convenient to review the facts chronologically, beginning with the union's defeat and subsequent dissolution in 1976. It is against this background which its current bargaining with K-Mart must be judged.

3. In 1975, the union was certified as the bargaining agent for a unit of employees similar to that which it now represents. There followed a long and unsuccessful effort to negotiate a collective agreement. The company remained resolutely opposed to the principle of union security — a position which the union interpreted as opposition to collective bargaining itself. The union concluded that the only way it would achieve a collective agreement was to call a strike. The strike dragged on for almost 6 months and many employees

drifted back to work before it ended. No agreement was ever concluded and, eventually, the union agreed to abandon its bargaining rights on the undertaking that the company would reinstate some of the striking employees without discrimination.

4. This 1976 experience profoundly influenced the union's assessment of K-Mart, and this in turn would significantly affect its bargaining stance 4 years later. In the union's view, the company was prepared to go to any lengths to prevent its employees from establishing a collective bargaining relationship through an independent trade union. The 1976 organizing campaign had been marred by employer unfair labour practices and the use of spies and "agents provocateurs". Criminal charges had later been laid against certain private investigators hired to infiltrate and disrupt lawful union activities. Senior K-Mart officials had been charged with criminal conspiracy. In short, K-Mart was regarded as a determined adversary prepared to flaunt the law when it suited its purposes to do so.

5. The results of the strike itself had been devastating. The employees suffered considerable financial hardship, but more important, the number of employees in the bargaining unit was reduced from more than 100 to 40, as during and after the strike, the company transferred their functions to other parts of its organization. The union believed that its unsuccessful attempt to establish a collective bargaining relationship had resulted in the loss of at least 40 bargaining unit jobs; and whether or not this assessment is correct, it goes a long way to explain the union's caution in 1980 when it found itself across the bargaining table from K-Mart once again.

6. Following the union's defeat in 1976, K-Mart permitted the formation of an employer-employee committee which would meet from time to time to discuss employer-employee relations. This arrangement proved unsatisfactory to some of the employees, and more importantly, to some of the members of the committee. One of them told the Board that the committee's function did not involve negotiations at all, but consisted largely of endorsing what the company had already decided to give its employees. This nucleus of discontent prompted a further approach to the Teamsters in 1979.

7. The union was initially cautious about becoming involved with K-Mart again. It was acutely conscious of its previous defeat; but it now appeared that a significant number of employees wished to be represented by an independent trade union. Charles Stewart Russell, the spokesman for about a dozen "fence-sitters", had opposed the union and the strike in 1976, but on canvassing employee opinion in 1979, concluded that the majority were in favour of an independent union. In consequence, he decided to support the union too, but vowed to oppose any attempt by the individuals he regarded as union activists, from promoting another strike. Not surprisingly, this concern was echoed by a number of union supporters who were in favour of collective bargaining through an independent union, but concerned about the prospect of another strike. The union was also conscious of the 1976 debacle, and assured potential supporters that it would not lightly take them out on strike again.

8. On February 4, 1980, the union applied for certification. A group of employees opposed that application – including some of the complainants herein. At the certification hearing it was agreed that there would be a representation vote. A vote was conducted, and the union won. In April 1980, the union was certified once again as the employee's bargaining agent. Following its certification, the union set about establishing a bargaining committee and formulating bargaining proposals. Some of the members of the old employer-employee

committee continued as members of the union's bargaining committee; however, efforts to solicit employee views about those bargaining proposals, to advise of meetings, or to report the progress of negotiations, were hampered by the employer's refusal to permit the union to post notices on its premises. This position, it might be noted, was in marked contrast to the way in which the company had treated the employer-employee committee. That body had held meetings on company time, conducted elections on company premises, had been permitted to post notices or distribute material in the cafeteria, and had announcements on its behalf announced over the company P.A. system. Notification of union meetings held by Teamsters Local 419 had to be by word-of-mouth among the employees in the warehouse. In the circumstances, there is nothing objectionable about this practice; nor was this form of notice in any way inadequate. As will become apparent, there was a large turnout for important union meetings of which both union opponents and supporters were well aware.

9. By the end of April, the union and employer had exchanged bargaining positions. As before, K-Mart was not prepared to accede to the union's position on union security and it is perhaps significant that the company was prepared to consider more generous economic terms if the union security demand was dropped. The union interpreted this position as an attempt to undermine its organization, but continued to hope that the exposure of the company's activities in 1976, and the pending criminal charges against its officials, would soften its bargaining stance. It didn't. The parties soon reached an impasse. A conciliation officer was appointed on April 24, but his efforts did not lead to a settlement. By the end of June the union was in a legal position to strike, but there was no employee support for this, the only effective means of applying pressure upon the company to modify its position. The company perceived, quite correctly, that the employees were not prepared to strike, and it governed its bargaining accordingly.

10. Sean Floyd, Secretary of Local 419, decided that some tactical advantages might be achieved if a strike vote were conducted and the bargaining committee were given a strike mandate. A meeting for this purpose took place on or about June 25, 1980, but the employees were unwilling to vote in favour of a strike until they were assured that it was purely for tactical purposes and the union had no intention of calling a strike without further authorization. On this basis those present voted unanimously in favour of a strike — a fact which Floyd hoped might induce the company to be more flexible. It didn't. The company was well aware of the union's weakness, and the employees' aversion to strike action. Indeed, the only suggestion that there was any willingness to go on strike came from certain of the complainants, and since these individuals had generally opposed the union from the outset and never become members, it is a little difficult to accept that they were now prepared to go on strike to establish a collective bargaining relationship. Their assertions in this regard serve simply to undermine their personal credibility and throw some light on the motivation and character of some of the union's opponents.

11. Following the June strike vote there were several meetings with the company and the submission of various alternative union proposals. All of these were rejected. Counsel for the company assured the union that it had K-Mart's final offer, and while certain cosmetic changes might be considered, there would be no substantial change in the company's position. When the bargaining committee pointed out that the company had granted a larger wage increase in the previous year, it was reminded that the employees had been told at the time that this was an extraordinary increase which was unlikely to be repeated.

12. The only break in the bargaining came when legislative change removed union security from the items in dispute. With this issue now resolved, the company proposed a new three year package which, in the union's view at least, contained economic terms much less generous than previous informal discussions had indicated the company was prepared to implement in the absence of the dues check off provision which the legislation now made mandatory. Sean Floyd concluded that the employer's proposal merely evidenced its unwillingness to enter into *any* agreement, but he agreed to put it before the employees together with the bargaining committee's recommendation that it be rejected. And it must be emphasized that at no time has the union complained to the Board that the company was bargaining in bad faith.

13. A meeting to consider the company's proposal took place on September 13. It was well attended and included those who supported the union as well as those who opposed it. The appearance of the latter was quite a surprise since they had taken no interest in the bargaining process previously, and a number of them had expressly stated their opposition to any collective bargaining relationship involving the union. Floyd carefully explained every item in the package, going through the contract clause by clause. The employees had a full opportunity to consider its contents, however, they were advised by Floyd and the bargaining committee to reject it. A secret ballot vote was conducted and the company proposal was unanimously rejected (29 - 0). Floyd told the Board that, in the view of the number of union opponents who had, in his view "packed" the meeting, he was surprised at the time that the vote was unanimous.

14. The rejection by the employees made no difference to the company's bargaining posture. Following the meeting, Floyd was advised that the union already had the employer's "final offer", and it was not prepared to change it. Nor did the appointment of a mediator alter the situation. Mediation did not bring about any material change in the company's position. Conscious of its superior economic strength, the employer was simply not prepared to compromise, and the inability of the union to mount a successful strike removed any incentive to do so. The union eventually concluded, correctly in our view, that further negotiations would be pointless. Although, from the union's point of view, the agreement was not a good one, it was all that the employer was prepared to offer. It was that or nothing. In the circumstances, the bargaining committee decided that it had no other choice, and agreed to reluctantly recommend that the employees accept the company's proposed package.

15. It might be noted at this point that the *Labour Relations Act* does not specifically require that a trade union conduct a ratification vote. Had the union simply signed the agreement, there might well have been no basis for the present complaint. Indeed, from a purely tactical point of view, the union and its supporters later acknowledged that it was probably unwise to conduct a further vote when opponents of the union would be permitted to cast a ballot, but be motivated as much by their perception of how best to undermine the union, as their concern about the actual contents of the agreement.

16. A meeting to consider the employer's final proposal was scheduled for December 3. That day, William Stewart and Amarnath Bhatia, two of the complainants herein, circulated about the warehouse mobilizing opposition, and urging non-members and union opponents to attend the meeting. As a result, virtually the entire bargaining unit was present.

17. The meeting was turbulent and at times disorderly. John MacDougal, one of the

complainants, was drinking in the back, and there was periodic heckling from union opponents. Stewart asked repeated questions, tried to dominate the discussion, interrupted other speakers, and refused to yield the floor to others. Despite these disruptions, however, there was a thorough, if sometimes heated, debate on the company's proposals. Copies of the proposed agreement had been circulated at the beginning of the meeting, and the employees were given a full opportunity to study them.

18. Jean Bigeau, the Vice-President of Local 419, chaired the meeting. He explained the details of the package and told those present that there was no possibility of any further movement on the part of the company. This was its final position. The union had exhausted all other options. And since neither the union nor the employees were prepared to engage in a strike, the bargaining committee was reluctantly recommending acceptance.

19. Bigeau, and two members of the bargaining committee — Jack Priestly and C. Stewart Russell — all testified that there was no sentiment in favour of a strike. When that option was raised during the debate, shouts of “No strike. No strike” resounded from various parts of the hall. When C. S. Russell (who, it will be recalled, had initially opposed the union, and always opposed a strike) mentioned that possibility, he was howled down, “booed”, and told to “shut up”. Even Bhatia, one of the complainants, acknowledges that “nobody” was in favour of a strike — as did Ed Northcott in his initial evidence (he contradicted himself when called in reply, some days later).

20. All of the members of the bargaining committee acknowledged that the agreement was not a good one — in fact, it differed very little from the package which had been put before the employees on previous occasions. Now, however, the members of the bargaining committee, and the union officials urged acceptance. While the agreement left much to be desired, there were certain non-monetary benefits, and the union would be established. It could solidify its position, and seek improvements in the next round of negotiations.

21. As we have already noted, a secret ballot vote was conducted and by a margin of one vote (18 - 17), the employees present disapproved of the company's proposal. The bargaining committee and many union supporters were disappointed. The union opponents were elated. Bhatia told the Board that he considered the vote to be a repudiation of the union which would prompt it to abandon its bargaining rights. At the end of the meeting, Bigeau merely indicated that he would put the matter before the union Executive Board for its consideration. It was uncertain how the union would respond to the vote, but clearly neither further negotiations, nor strike action were viable alternatives. Moreover, the union constitution empowered the Executive Board to accept a final company offer which had not been rejected by at least two-thirds of the membership. While these constitutional provisions, of course, are in no way binding upon this Board, they nevertheless reflect the collective bargaining reality that only a strong majority would be in a position to conduct a strike or assert sufficient pressure to improve an employer's final offer.

22. The bargaining committee, the President of the union, and several members of the executive board discussed the matter in mid-December. The K-Mart employees advised the Executive Board that they had taken soundings of the employees after the meeting, and were convinced that they were prepared to accept the agreement rather than lose the union. Both Jack Priestly and C. S. Russell, members of the bargaining committee, gave evidence before the Board, and there is no doubt that they sincerely believed this to be the case, and that in the

circumstances, accepting the company's position was in the employees' long-run best interest. They advised the Executive Board that the employees still supported the union, and urged them not to abandon these supporters. Privately, however, they were worried that the union would simply walk away. It had already expended considerable money and effort over 4 years to organize this group of employees and was unenthusiastic about the prospect of signing a mediocre agreement in circumstances where at least a significant minority of the employees opposed the union altogether.

23. These and other considerations were reviewed at the January Executive Board Meeting where the pros and cons of the various alternatives were debated. Serious consideration was given to abandoning the bargaining rights, but this would necessarily mean abandoning its members — some of whom had remained committed to the union throughout the 1976 strike and had actively assisted in the 1979 campaign. Floyd reminded the Executive Board of the jobs which had been lost during the last strike and indicated that 13 or 14 of the votes against the agreement must be regarded as opposition to the union per se, which had mobilized during the organizing campaign and had surfaced in organized form, from time to time thereafter. Moreover, there was a real concern that to abandon its members now, would leave them exposed to employer retaliation. Such reprisals would, of course, be illegal; but, in view of the union's previous experiences, there was a genuine concern for its supporters' job security. And there was absolutely no doubt (nor does this Board have any) that the union had to either accept the employer's proposed agreement, or there would be no agreement and no bargaining relationship at all.

24. There was no doubt that the agreement represented a capitulation to superior bargaining strength, but the fact that any agreement had been achieved at all was regarded as a positive step. It achieved a foothold in a company which was regarded as staunchly anti-union. From this base, the union hoped that it could strengthen its organization and improve the employees' position in future contracts. The union president volunteered to intervene personally and act as business agent servicing the K-Mart employees — something he hadn't done for almost ten years. In the end, a combination of reluctance to abandon the bargaining unit, concern about possible reprisals against its supporters, and optimism about the future, prompted the union to sign what it does not dispute is a mediocre agreement. It does not seem to have occurred to anyone that concluding an agreement in these circumstances might be illegal or that the union might have been better advised to call a further meeting of the K-Mart employees to review the options once again and hold another ratification vote. Instead, it acted upon the advice of the K-Mart employees on the bargaining committee and its own sense of obligation and assessment of the situation.

25. The union and employer agreed that on February 19, 1980 (that is, after the filing of the present complaint) the parties would meet for the purpose of concluding a collective agreement on the terms proposed by the company. This meeting was not without incident, for the company inquired for the first time about the union's reaction to a one-year agreement embodying the same terms as the first year of the three-year package. This proposal, however, was informal, tentative, and apparently intended to be the basis for further negotiation. It was clear that the company had no intention of improving the actual terms of the agreement, and the union was suspicious that this eleventh hour offer was merely a ploy to avoid signing an agreement, or extend negotiations beyond the one-year period (from the date of certification) during which the union would be protected from a "raid" or a termination application. There was no assurance that the company was actually prepared to sign such a one-year package

immediately, and in the circumstances, the union insisted upon execution of the agreement upon which the parties had previously agreed and for which the February 19th meeting had been scheduled. At that point C. A. Cumiskey, the company official who (with counsel), had conducted the negotiations on behalf of the company, announced, for the first time, that he had no authority to sign a collective agreement on behalf of the employer. The agreement would have to be executed by his superiors and could be picked up the following day. The union signed the document on February 19, as planned, and the agreement, duly executed by the company, was picked up on the following day. That agreement has now been fully implemented.

26. The provisions of the Act upon which the complainants rely are as follows:

15. The parties shall meet within fifteen days from the giving of the notice or within such further period as the parties agree upon and they shall bargain in good faith and make every reasonable effort to make a collective agreement.

72(4) A strike vote or a vote to ratify a proposed collective agreement taken by a trade union shall be by ballots cast in such a manner that a person expressing his choice cannot be identified with the choice expressed.

72(5) All employees in a bargaining unit, whether or not such employees are members of the trade union or of any constituent union of a council of trade unions, shall be entitled to participate in a strike vote or a vote to ratify a proposed collective agreement.

72(6) Any vote mentioned in subsection 4 shall be conducted in such a manner that those entitled to vote have ample opportunity to cast their ballots.

68. A trade union or council of trade unions, so long as it continues to be entitled to represent employees in a bargaining unit, shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit, whether or not members of the trade union or of any constituent union of the council of trade unions, as the case may be.

It will be convenient to deal with each of them in turn.

27. The complainant contends that by concluding a collective agreement on terms which the majority of the bargaining unit had previously rejected, the trade union was "bargaining in bad faith". There is no merit to this contention. In the first place, a group of individual employees does not have status to assert a violation of section 15. The section, by its terms, appears to create obligations and regulate relations only as between the trade union and employer (see *Canadian General Electric*, [1980] OLRB Rep. Aug. 1179). But even if the complainants could rely on section 15, there has been no breach of that provision in the instant case. It is manifest that throughout, the trade union has bargained in good faith and the evidence amply demonstrates that it has made every reasonable effort to achieve, and did in

fact achieve, a collective agreement. Had the union not acknowledged the employer's superior bargaining power and eventually acceded to the employer's position, it is doubtful whether a collective agreement would ever have been achieved. In the circumstances, there is clearly no breach of section 15.

28. The complainants' principal contentions involve section 72 and 68. Counsel argues that these provisions deprive a trade union of its independence in the conduct of collective bargaining, and make it the instrument of the majority voting in a strike or ratification vote. Thus, if the majority endorse a proposal put to them by the union, the union must execute an agreement on those terms and cannot accept anything less. If the majority reject such proposal, the union cannot, in any circumstances, accept it, or sign an agreement on that basis. If the majority of employees in the bargaining unit do not authorize strike action, the union is precluded from calling a strike; but if the majority votes in favour of strike action, its wishes must be respected and a strike must be called — however ill-advised or unwarranted a strike may appear to the union officials directly engaged in the bargaining. All of this, it is argued, is implied by sections 72 and 68. The complainants argue that the trade union has breached these obligations, and that consequently, the subsisting collective agreement must be set aside, and the union directed to resume bargaining.

29. Section 72, on its face, does not address the question of the effect of a strike or ratification vote, if the union decides to hold one. There is no language similar to that found in section 7(4) or 57(4) stating the outcome or result which must follow if "more than fifty per cent of the ballots cast" are in favour of one of the options presented. Of course, if the union has already executed an agreement "subject to ratification", the result of a positive ratification vote would be a binding collective agreement; but section 72, by itself, does not bring about this result, nor does it address the situation where the vote is negative. Indeed, there is no statutory requirement to hold a strike or ratification vote. The latter may be triggered by the Minister of Labour pursuant to section 39, or the employer itself pursuant to section 40; but unless these actions are resorted to, the issue is left to the union to be determined in accordance with its constitution and/or its own appraisal of the tactics of the situation. The rigid and binding effect of a vote, which the complainants contend is implicit in section 72, seems oddly out of tune with the fact that the vote itself is entirely discretionary. And it is equally curious (or at least arguably so) that an organized minority opposed to collective bargaining itself could "tip the balance" so as to frustrate the ratification of a proposed agreement and precipitate a strike in which they had no intention of participating. There is no doubt that many of the complainants in this case are, first and foremost opponents of the union itself. Bhatia was the most candid in this regard when he explained to the Board that in his view a vote against the proposed agreement would induce the union to walk away.

30. Section 72, by its terms, appears only to regulate the voting constituency and procedure. It does not purport to bind the trade union to any particular course of conduct in light of the results. Nor is the "dispute settlement" rationale discussed by the Board in *Canada Cement Lafarge*, [1980] OLRB Rep. Nov. 1583, readily applicable to a vote conducted entirely at the discretion of the union, and in a case where the union chose to *avoid* a damaging strike by *accepting* a company offer acceptable to at least forty-nine per cent of the employees in the bargaining unit, (and perhaps more if one accepts the bargaining committee's evidence that some of the opponents had had a change of heart after the vote when the alternative of the trade union withdrawing altogether was raised). In *Canada Cement Lafarge*, the Board had before it a union refusing to end a strike despite a vote (fifty-eight to fifty-seven) in favour of

the employer's outstanding settlement offer. Here we have the converse. The situation in *Canada Cement Lafarge* would be parallel to that in the instant case only if the employees in *Canada Cement Lafarge* had voted 58 to 57 *against* accepting the company's settlement offer, but the union had concluded that it was untenable to maintain a strike in face of such significant opposition, and had executed an agreement on the company's terms. And even in *Canada Cement Lafarge*, the Board did not conclude that the vote, in itself, led inevitably to any particular result. The Board ruled only that a majority acceptance of an employer's offer in a vote held pursuant to section 40 (which we again emphasize this is not) would, unless there were extenuating circumstances, usually obligate a trade union to execute an agreement on that basis, *because of its obligations under section 15 of the Act*. The result was not automatic, nor was the union's obligation implied solely from the language of section 40. And of course the language of section 40 is quite different. Accordingly we do not think *Canada Cement Lafarge* answers the issues raised in this case.

31. In our view, section 72 should be read literally and in accordance with its express terms. Those terms concern the voting constituency, and voting procedures in a strike or ratification vote which the union decides to hold. They require only that the vote be by secret ballot, that there be adequate notice, and that all employees in the bargaining unit be permitted to vote. We are satisfied that there has been no contravention of these specific terms of section 72, and we are not prepared to read into that section the collateral obligation which the complainants contend is implicit. The remedy which the complainants seek, if it is to be granted at all, must be founded on a breach of section 72 of the Act.

32. Section 72 prohibits a union from acting in a manner that is "arbitrary", "disbrimatory" or "in bad faith", but leaves it to the Board to determine how this general language should be interpreted and applied in any particular case. It is beyond doubt that, the duty of fair representation owed to employees in a bargaining unit is just as relevant during the negotiation of the collective agreement as during its term of operation — although, of course, the context is quite different, and this must be taken into account when the propriety of a union's conduct is being assessed. This point was discussed by the Board in *Diamond Z Employees Association* [1975] OLRB Rep. Oct. 791 in a long passage to which we might usefully refer:

12. What then constitutes a breach of the trade union's duty of fair representation? We have concluded that a breach of the duty most often comprehends conduct that is so wanton that the most modest of employee expectations to the benefits of collective bargaining have been betrayed by his trade union. (See; *The Canadian Union of Public Employees Local 1000* and *Ontario Hydro Employees Union* OLRB M.R. May 1975 444 at pp. 450 to 464 for a review of the authorities.) In defining the type of misconduct contemplated by the Legislature the Board requires that a trade union not act "arbitrarily" in the sense that it fails to address itself to the particulars of an employee complaint and thereby disposes of it without regard to its merits. In short, a union is constrained from treating employee complaints in a capricious or perfunctory manner. A trade union must not act "discriminatorily" in that the benefits of representation are conferred on one member of the bargaining unit and denied another without reasonable excuse.

Like situations ought to be treated in a like manner and without favour to any one individual. And finally a trade union must act in good faith and without malice or hostility to the complainant. An employee is entitled to be represented by his trade union with candour and with honesty in connection with the disposition of his concerns. A trade union that declines upon proof thereof to satisfy these simple employee expectations will be liable to pay the penalties contemplated by the remedial provision of *The Labour Relations Act*. (See: *The Alfred Compton* case OLRB M.R. October 1972 917; *El Mocambo* case OLRB M.R. October 1972 862; *The Joseph Pap* case M.R. January 1974 60).

13. The situation presently before the Board is unique in that the complaint pertains to a trade union's conduct after certification in negotiating its first collective agreement. There is no dispute that the duty of fair representation owed employees in a bargaining unit is just as relevant during the negotiation of a collective agreement as during its term of operation once concluded. It is also without dispute that the pivotal period anticipated in the collective bargaining process is the conclusion by the parties of a collective agreement. The supervisory jurisdiction of the Board as expressed in the Act in connection with the conduct of both union and employer during negotiations is restricted to the requirement that the parties "shall bargain in good faith and make every reasonable effort to make a collective agreement". Save for this mandatory requirement the Board in applying a standard owing employees in the bargaining unit during the negotiating process is conscious that it must not interfere with the wide discretion conferred the employees' "exclusive bargaining agent" to reach a settlement. The Board is cognizant, especially during the negotiation of a first agreement that the period preceding the making of a collective agreement is often when employees' hopes for improved terms and conditions of employment are at their height. Indeed the trade union may have induced these expectations by representations made during the course of an organizational campaign or at the twilight of an agreement about to expire. The realities of the negotiating process however may often result in some measure of employee disappointment with respect to the ultimate settlement. The synthesis contemplated in the bargaining process where the initial positions of the parties are subjected "to the give and take" of compromise and concession is bound to cause some measure of alteration in those positions. In this context the trade union representative must be at his most adroit. He must convince the rank and file that the sacrifice of long term benefits for immediate gains is desirable having regard to the particular circumstances. The employees must be convinced that the benefits not included in a settlement are merely deferred benefits until the onset of the next bargaining session. In the same context the employer's strategy of containing the more excessive demands of the trade union may have

resulted in the avoidance of a work stoppage by virtue of acceding to the minimal requirements that constitute in the circumstances a fair settlement. Achieving this mutual accommodation requires the unfettered discretion of the representatives of the parties to explore all avenues of accommodation without the intervention of this Board in setting standards of conduct that may be characterized as an unwarranted intrusion in their private affairs. We are of the view that the representative trade union despite its obligation to employees in complying with the duty of fair representation must necessarily have “a free hand” in setting strategies that will best forward employees’ interests irrespective of their expectations. (See; *The Nicholas E. Erderly* case OLRB M.R. September 1972 844).

14. What then ought to be the minimum expectation of employees with respect to their union’s compliance with the duty of fair representation during the negotiating process? We do not intend by raising this question to prescribe a standard of conduct that could be construed to interfere with the internal procedures of trade union. A Union may have adopted its own procedures, whether governed by regulations contained in its constitution or by past practice, for communicating business matters to its constituents. Some trade unions as a matter of general practice will seek the approval of the rank and file prior to concluding a formal collective agreement; whereas, other unions may be authorized by their principals to enter into an agreement without prior consultation. Of those trade unions that do refer tentative settlements to the rank and file some may require the recommendation of their representatives; others may not. In other words the practice that is adopted by a trade union in negotiating process is not intended to be assessed in determining whether a breach of the duty of fair representation has occurred. Matters pertaining to that issue ought to be resolved privately by the parties having regard to their particular needs. (See; *The Arthur Joseph Roberts* case OLRB M.R. March 1974 169 at p. 172; *The General Impact Extrusions* case OLRB M.R. August 1972 798; *The Canadian Textile and Chemical* case OLRB M.R. August 1971 469 at p. 470 for Board expression of its concern in interfering in internal union affairs). What the Board is concerned about in measuring the conduct of union representatives during the negotiating process is whether the employees affected have been treated honestly and in good faith. The adequacy of the settlement and the formal processes adopted in order to arrive at an accommodation are not necessarily in issue. What is in issue is whether the trade union by its conduct has acted fairly in the interest of employees in dealing with the employer with respect to their terms and conditions of employment.

It should be emphasized, however, that *Diamond Z* was a case in which the Board found dishonesty and bad faith on the part of a union officer who had lied to, and actively misled the members of the unit. In this respect, *Diamond Z* is readily distinguishable from the instant case; however, we endorse the general approach enunciated above.

33. It is argued by the complainants that the union's conduct was "undemocratic" and thus contrary to section 68. There are several answers to this submission. First the Act does not purport to regulate internal union democracy per se — perhaps in recognition of the fact that a union is a "fighting organization" and may have its effectiveness as a collective bargaining mechanism impaired if its officers were regarded as "delegates" rather than "representatives" of the employees in the unit. Secondly, the reference to democracy is not really very helpful. Not only does it ignore the special collective bargaining context but even in "democratic" institutions such as the Legislature or Parliament, once representatives are elected they are left to vote as they wish or enact laws even though a majority of their constituents may not agree with their position. The remedy is at the ballot box, or in the present context, through a termination application. In determining whether there has been a breach of section 68 in the instant case, we have found it more helpful to ask what the union could/should have done? What were its options?

34. On the basis of the evidence before us, it is clear that further negotiation would have been fruitless. The union had the employer's final offer, and there was no prospect whatsoever that it would be improved. Even if we were to grant the complainants' request to set aside the collective agreement, there is not the slightest indication that the company is prepared to alter its bargaining stance. Indeed, counsel for the complainant conceded as much, alluding, in passing to other possible resolutions (presumably a termination application) of the "problem". Equally clearly the trade union could not have called a strike. It would have been irresponsible in the circumstances to do so as well as possibly contrary to the union's constitution. (As we have already mentioned, the constitution's requirement for a special majority to reject an employer's final offer reflects the realities of collective bargaining; moreover, the fact that the union was purporting to act pursuant to its constitution, while not determinative, does suggest that it was not in "bad faith" or in "arbitrary" or "discriminatory" fashion). Finally, the union could have abandoned its bargaining rights, leaving its supporters to fare as best they could.

35. We do not think that the union was required to resume futile bargaining, engage in an unpopular and abortive strike, or walk away from its bargaining rights, for, to hold that it was required to adopt any of these options would be to say either that it must participate in a pointless charade, and engage in an exercise in self-destruction, or that the repudiation of the employer's offer should be construed (as Mr. Bhatia did) as an effective termination of its bargaining rights. We are not prepared to make such finding. There is no doubt that the union carefully considered the options open to it, and weighed all of the circumstances including the collective bargaining reality of the situation, the terms of its constitution, and the motivation of its opponents. There was no "bad faith" in the sense of personal animus against the employees in the unit. Indeed we were impressed by the sincerity of the respondent's witnesses and their obvious concern as they grappled with a difficult decision. The situation here is in marked contrast with that in *Diamond Z (supra)*.

36. A heavy onus lies upon a trade union which flouts the will of the majority of the employees in the bargaining unit, to demonstrate that its conduct does not amount to a breach of section 68. In the instant case, we are satisfied that that onus has been met. The union might have been better advised to have made a further effort to build support for its position before accepting the employer's offer, and probably should have made it clear from the outset that in the absence of a commitment to strike action the employees were unlikely to achieve a very good agreement. However, in all of the circumstances of this case, we cannot find that the

union's decision to accept the employer's offer was an unreasonable one; and while one might fault its judgment at various times, we do not think its conduct amounts to a breach of section 68 of the Act.

37. Having regard to the foregoing, the complaint is dismissed.

DECISION OF BOARD MEMBER F. W. MURRAY:

1. I agree with the result my colleagues have reached in this matter. It should be noted however, that despite the union's assessment of K-Mart, there were no allegations of misconduct during the most recent organizing campaign, and no allegation that the company bargained in bad faith. It is the union, not the company which is the respondent in this case, and we express no opinion on the character or conduct of the former.

1326-81-R Labourers' International Union of North America, Local 183, Applicant, v. **Marchant Property Management** (A Division of Marchant & Company Ltd), Respondent.

Employee – Union claiming industry practice to exclude wives of superintendents from collective bargaining – Whether Board considering wives not “employees” under Act

BEFORE: R. O. MacDowell, Vice-Chairman, and Board Members J. D. Bell and B. L. Armstrong.

APPEARANCES: *Brian Yandell, for the applicant; Paula M. Rusak and Wayne Gallier, for the respondent.*

DECISION OF THE BOARD; October 21, 1981

1. This is application for certification.
2. The Board finds that the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act*.
3. Having regard to the agreement of the parties, the Board finds that all employees of the respondent engaged in cleaning and maintenance at “The Guildford”, 3380 Eglinton Avenue East, Scarborough, Ontario, including resident superintendents, save and except property manager, office and clerical staff, persons employed for not more than nineteen hours per week and students employed during the school vacation period, constitute a unit of employees of the respondent appropriate for collective bargaining.
4. While the parties are in agreement with respect to the description of the bargaining unit, a question has arisen between them concerning the employee status of two of the four individuals appearing on the respondent's employee list. The two disputed individuals are the

wives of James Pringle and Calvin Struthers, the superintendent and assistant superintendent respectively.

5. The applicant contends that in accordance with the established practice in the industry, the wives of the superintendents should not be considered "employees" within the meaning of the *Labour Relations Act*. The applicant does not agree with this practice (which, for reasons which will become apparent, may put women at a real economic disadvantage) but the practice is a long-standing one and apparently has been taken into account when collective agreements have been negotiated. However, this issue has not previously arisen before the Board although, on numerous occasions, bargaining units similar to that sought in the instant case have been certified. Apparently, no party has ever considered it necessary to raise it.

6. Counsel for the respondent contends that the spouses of the superintendents are properly regarded as "employees" within the meaning of the *Labour Relations Act*. The couple are hired as a team and both of them perform work for the respondent. Unsatisfactory work performance by either partner can lead to termination. Both husband and wife are under the direction, control and authority of the respondent's management. They share an apartment provided for their use. However, the salary or compensation associated with the work of the team is paid only to the husband. No income tax is deducted on behalf of the wife, nor is she issued a T-4 form. There are no Unemployment Insurance, Canada Pension Plan, or Workmen's Compensation deductions either. It is this latter aspect of the relationship with which the union does not agree and which may place the wife at a severe economic disadvantage in a variety of circumstances beyond her control.

7. The essence of an employment relationship is that an individual provides work or services to another for compensation. (See generally *Whittaker vs. Minister of Pensions and National Insurance* [1966] 3 All ER 531; and the recent review of the indicia of employment in *Algonquin Tavern* [1981] OLRB Rep. Aug. 1057. In the instant case there is no doubt that the wives of the superintendents perform work or services under the direction and control of the respondent's management. Equally clearly they are not "volunteers", but part of an "employment team" hired to do this kind of work. We do not think the fact that the teams' remuneration is paid to only one spouse is determinative of the character of the relationship; nor, in the circumstances of this case, have we given much weight to the respondent's failure to deduct employee benefits. (The respondent's obligation in this regard depends upon the definition of "employee" in other statutes as does the wives' entitlement to benefits). In our view the respondent's provision of accommodation shared by both spouses is more indicative of the character of the relationship. On the basis of all of the evidence before it, the Board finds that Marylous Pringle and Rita Struthers are employees within the meaning of the *Labour Relations Act*.

8. The Board further finds that not less than forty-five per cent of the employees in the bargaining unit at the time the application was made were members of the applicant on September 25, 1981, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

9. A representation vote will be taken among the employees in the above-described bargaining unit. Employees will be asked to indicate whether or not they wish to be represented by the applicant in their employment relationship with the respondent. Those

entitled to vote shall be all employees on the date hereof who do not terminate their employment or who are not discharged for cause between the date hereof and the date on which the vote is taken.

10. The matter is referred to the registrar.

1665-80-R Employees' Association of Milltronics, Applicant, v. Milltronics Limited, Respondent, v. United Electrical, Radio and Machines Workers of America (UE), intervener.

Certification – Pre-Hearing Vote – Trade Union – Employee association winning vote – Whether certification barred because of employer support – Whether association received favoured treatment during campaign – Whether vote not voluntary because of employer conduct

BEFORE: Pamela C. Picher, Vice-Chairman and Board Members H. J. F. Ade and O. Hodges.

APPEARANCES: Michael G. Horan and Norman Forrest for the applicant; J. P. Wearing and P. Day for the respondent; Susan Stewart, Art Jenkyn and J. Welch for the intervener.

DECISION OF VICE-CHAIRMAN, PAMELA C. PICHER AND BOARD MEMBER H. J.F. ADE; October 22, 1981.

1. This is an application for certification for the employees at the respondent's plant. The applicant, the Employees' Association of Milltronics (hereinafter referred to as "the Association") is seeking to displace the incumbent union, the United Electrical, Radio and Machine Workers of America (hereinafter referred to "the U.E.").

2. The Board finds that both the Association and the U.E. are trade unions within the meaning of section 1(1)(p) of the *Labour Relations Act*. The Association was first given status as a trade union by this Board on July 28, 1977; its union status is not being challenged in this proceeding.

3. On July 28, 1977 the Association was certified by the Board to represent employees of the respondent in two separate bargaining units, one of plant employees and the other of office and clerical employees. Following certification, the Association and Milltronics entered into a collective agreement effective June. 1, 1978 through December 31, 1979 covering the employees in both bargaining units. During the open period of that agreement, on November 1, 1979, the U.E. applied to be certified to represent the employees in the respondent's plant, thus seeking to displace the Association's bargaining rights for the plant employees. Witnesses on behalf of the U.E. testified that the genesis of the U.E.'s displacement application was employee dissatisfaction with the then president of the Association, arising in part from his extended absences. The rest of the Association's executive then brought forward the U.E.'s

application for certification. The U.E. won the representation vote ordered by the Board and was certified on January 15, 1980 as the exclusive bargaining agent for the plant employees. In March of 1980, the U.E. and Milltronics entered into a collective agreement effective January 1, 1980 through December 31, 1980.

4. The Association's bargaining rights continued for the office and clerical employees. On December 19, 1980 the Association and Milltronics entered into a one year agreement for these employees commencing January 1, 1981. Following the U.E.'s certification, the Association voted in a new president.

5. During the open period of the U.E.'s collective agreement the Association, by way of the application presently before the Board, again applied to be certified for the plant employees. By a decision dated November 21, 1980 the Board directed the taking of a pre-hearing representation vote among the plant employees. The vote taken on December 2, 1980 between the Association and the U.E. was won by the applicant Association.

6. Notwithstanding the outcome of the representation vote, the U.E. alleges that pursuant to the provisions of section 13 of the Act, the Association should not be certified. Section 13 provides as follows:

The Board shall not certify a trade union if any employer or any employers' organization has participated in its formation or administration or has contributed financial or other support to it or if it discriminates against any person because of his race, creed, colour, nationality, ancestry, age, sex or place of origin.

The U.E. maintains that the employer has rendered "support" to the Association through various acts dating back to the U.E.'s original quest for bargaining rights.

7. In the alternative, the U.E. argues that the Association's application should be dismissed because the true wishes of the employees were not expressed in the representation vote held on December 2, 1980. In support of this position, the U.E. relies on the company's failure to implement an award of a board of arbitration requiring employees to pay union dues or be dismissed.

8. We turn first to the U.E.'s claim under section 13 of the Act. The evidence may be divided into three categories; employer conduct preceding the first representation vote held between the U.E. and the Association in 1979, employer conduct following the U.E.'s certification and employer conduct during the campaign leading up to the second representation vote taken pursuant to the instant application.

9. In November of 1979, prior to the first representation vote between the Association and the U.E., the company issued numerous letters to employees reflecting its preference for the Association over the U.E. The U.E. argues that these letters demonstrate the extent to which the employer wanted to preserve its relationship with the Association and avoid a bargaining relationship with the U.E. In this manner, the U.E. argues, the employer demonstrated "support" for the Association for the purposes of section 13 of the Act. One typical letter expressed the following views:

November 26, 1979

Dear ...

Sometime in the near future, you may have the opportunity to decide by ballot whether we will continue to conduct our employee relationships as we have in the past or have the United Electrical Radio and Machine Workers of America act as the bargaining agent at Milltronics.

I sincerely believe you will be happier over the long run by working out your problems in the spirit of co-operation that we have always enjoyed. Your choice will be between the United Electrical Radio and Machine Workers of America and your Association. You will vote by secret ballot, no one but you will know how you vote. No card or anything else you may have signed forces you to vote for an American International Union. Nor will the fact of your membership in your Canadian Employees' Association require you to support it — You are free to choose as you wish.

In deciding how you will vote, I am sure you will study closely the pros and cons of outside representation. You have seen forceful examples of the unrest, violence, loss of pay and sales that strikes can cause. Our own city has had its share of losses due to strikes, Your Association has not been part of that record.

None of us want this kind of threat hanging over us, you do not need a lot of strangers to help you run your affairs at Milltronics. I urge you to vote "NO" to the International Union.

"A. E. Gillis"

Another letter dated December 11, 1979 provides as follows:

Dear ...

Over the past few weeks we have been working with members of your Association to negotiate a fair agreement that will ensure your security and provide reasonable wages and benefits for the next two years. The Ministry of Labour's appointed Conciliator, the Association Team and Management's Team honestly believed that we had bargained for the best possible contract. We feel that our efforts to re-classify the lower paid workers, our initiation of Labour/Management talks on a regular basis, improvements of the grievance procedure along with the benefit and salary increases mentioned is a most progressive step forward.

One of the major needs in a Company, as in a family, is the need to communicate. With proper communication we can build the trust that is necessary for a good working relationship.

Over the past couple of years we have made changes and errors that

have strained our lines of communication. Consequently, we have lost the trust of some employees. We believe that the Labour/Management meetings that are to be held on a regular basis will re-build this trust. We believe that we can all use these talks to "clear the air" and resolve problems before they become too big to handle. We ask you to give us this chance.

During the past few months our attempts to communicate with you have been restricted by the provisions of the Labour Relations Act. As an example, Milltronics cannot promise you anything, they cannot threaten you, intimidate you or even suggest how you should vote. In effect we can say nothing. But, on the other hand, the union can promise you anything [. H]owever, as you well know promises are not guarantees.

The paid organizers of this International Union and those at Milltronics who are helping them will come to you with promises and criticisms of Milltronics. The criticisms you should judge for yourself. You know more about Milltronics and its people than any paid organizer or any organizer from another plant working for the United Electrical Radio and Machine Workers of America *could* ever know.

We ask that you be very careful in your preparation and consideration for the vote on December 17th, how you vote will affect your working life for the future.

"A. E. Gillis"

10. Despite the employer's expressed preference for maintaining its bargaining relationship with the Association, the U.E. won the representation vote, thereby displacing the Association's bargaining rights in the plant. The letters do not contain threats or promises. They express, though, the employer's preference for maintaining its bargaining relationship with the Association. Clearly major portions of the letters fall within the free speech protection provided employers under section 64 of the Act. To whatever extent, if any, any segment of the employer's letters pass the bounds of protected expression, the employees, as a group, were not prevented from expressing their preference for the U.E. in the representation vote. (For cases indicating that standing alone, the mere expression of a preference for one of two competing trade unions would not constitute "other support" see *R. v. Malone Winnipeg and Free Press Co. Ltd.*, 76 CLLC ¶14,046 (Manitoba Court of Appeal); *Bonavista Cold Storage Co. Ltd.*, 57 CLLC ¶18,094 (Newfoundland L.R.B.); *N.L.R.B. v. Corning Glass Works* (1953), 32 LRRM 2136 (U.S. Court of Appeals, First Circuit) and *N.L.R.B. v. Wagner Iron Works* (1955), 35 LRRM 2588 (U.S. Court of Appeals, Seventh Circuit). No complaint was made by the U.E. about the employer's letters prior to the 1979 representation vote. The first time the U.E. raised the issue was over a year later when it lost the representation vote taken pursuant to the instant application.

11. Given the absence of threats or promises in the letters, the amount of time that has passed since they were written, the certification of the U.E. and the collective agreement that followed immediately thereafter, the Board cannot conclude that the 1979 letters are sufficient to trigger section 13 of the Act. At best the letters might lend colour to more recent events if those events otherwise demonstrate "support" for the Association.

12. Moving forward in time, the U.E. further complains that throughout its bargaining relationship with Milltronics the employer has exhibited a desire to rid itself of the U.E. and regain its relationship with the Association. The Board has carefully reviewed the testimony and documents and finds no evidence of “support” for the Association through the manner in which the employer conducted itself in its bargaining relationship with the U.E.

13. The U.E. complained, for example, that the employer demonstrated a desire to rid itself of the U.E. by entering a one year rather than two year agreement with the U.E. In support of this argument the U.E. notes that prior to the 1979 representation vote won by the U.E., the employer had expressed a desire to have a two year agreement with the Association for both the plant and office bargaining units.

14. Prior to the U.E.’s application for certification the employer and the Association had entered joint negotiations for both the office and plant employees. With the U.E.’s application, the combined bargaining was severed. For the office employees, the employer had presented two offers. One was for a one year agreement with a particular percentage wage increase and the other was for a two year agreement with a different percentage increase. The two packages were put to the employees by the Association and they voted in favour of the one year agreement. Ultimately, following that expressed preference, the Association selected the one year agreement. In these circumstances the Board can draw no adverse inference against the employer from the fact that the employer originally expressed a preference for a two year agreement but then entered into a one year agreement for the office.

15. For the plant employees, the U.E. made an initial request for a two year agreement. At that point, however, the company stated that it wanted a one year agreement and the U.E. consented. There is no evidence to suggest that the duration of the collective agreement was a matter of contention between the parties. Mr. Phillip Day, the supervisor of employee relations for Milltronics, testified that the company expressed a preference for a one year agreement because it was entering into a new bargaining relationship with a new union. Day testified that with a new union and a new contract the employer wanted to have a year to iron out initial wrinkles.

16. The Board found Mr. Day to be a credible witness and accepts his explanation. The company had not adopted a pattern of two year agreements from which it made a radical departure for the U.E.. From the circumstances surrounding the term of the U.E.’s agreement, the Board finds no evidence of “other support” for the purposes of section 13 of the Act.

17. The U.E. further complains that the employer exhibited “other support” for the Association by the way it dealt with the U.E. throughout its tenure as bargaining agent for the plant employees. The U.E. maintains that the employer tried to frustrate the normal union/employer bargaining relationship by discouraging U.E. union stewards from filing grievances and by refusing to allow employees to bump into the transducer department.

18. Day testified that the U.E. filed approximately sixteen written grievances. Four went to the fourth stage of the grievance procedure and two of those were referred to arbitration. One of the two referred to arbitration was withdrawn by the union and the other grievance relating to union dues proceeded through the arbitration process. The other twelve grievances were resolved either at the second or third stage of the grievance procedure. Testimony from U.E. witnesses reveals that a large number of those grievances were dropped

by the union. From a record such as this, the Board cannot conclude that the employer deliberately sought to frustrate its bargaining relationship with the U.E.. Apart from the matter relating to union dues discussed in further detail below, there was no instance where the U.E. even argued to this Board that the employer took an unreasonable view of its rights under the collective agreement.

19. A number of grievances stemmed from the union's complaint that employees were not being allowed to bump into the transducer department. The U.E. acknowledges both that Mr. Day listened to their point of view during the grievance meetings and that the company was not violating the collective agreement by denying the employees the right to bump into the transducer area. The substance of the U.E.'s complaint as it relates to section 13 of the Act is that the employer refused to adopt what the U.E. believed was a valid suggestion for the resolution of their differences. The Board heard evidence from the company about the unique problems facing the transducer department at that time. From this unchallenged evidence the Board is fully satisfied that the employer's response to the union on matters relating to the transducer area was prompted entirely by *bona fide* business considerations and not at all by an attempt to undermine the credibility of the U.E.

20. Turning to the next period of time, the U.E. complains that the employer exhibited "support" for the Association during the campaign which preceded the representation vote in issue before this Board. On November 19, 1980, the company posted the following notice in the plant:

As a result of complaints from Supervisors regarding "campaigning" during working hours and a definite problem with productivity in the panel assembly area, P. G. Day met with the following:

D. D. Cassey	
N. Forrest	Association President
J. Welch	Union Local President
R. Head	Union Negotiating Committee

The following points were outlined to the Association and Union personnel:

1. Productivity is suffering because of campaign activity.
2. Individuals have been previously warned, (M. Legrow of the Union and B. Rudolph for the Association).
3. Supervisors have been instructed to enforce normal disciplinary rules regarding leaving work stations for other than acceptable reasons and for Union or Association activity during working hours.
4. The Company will not tolerate this counter productive effort, these kinds of activities must be confined to other than working hours.

21. It is common ground that prior to the meeting referred to in the above memorandum, both the U.E. and the Association were engaged in vigorous campaigns. Many

discussions occurred on company time during which both Association supporters and U.E. supporters attempted to persuade employees to join their ranks. There is no evidence suggesting to the Board, however, that either in tolerating such discussions during working hours or in ultimately seeking to circumscribe them through the meeting and memorandum, the company displayed any imbalance in its treatment of the two competing unions.

22. The U.E. complains, though, that the employer showed favouritism to the Association during the campaign by not adequately disciplining Mr. Benjamin Rudolph for taking a fellow employee, Ms. Betty Chappell, away from her work station for approximately twenty-five minutes on October 21, 1980 to discuss the union situation.

23. To encourage Ms. Chappell to leave her work station Mr. Rudolph, quite unintentionally, used words that caused Ms. Chappell substantial personal upset because of an illness in her family. The U.E. acknowledges that Rudolph was directed by Day to apologize to Chappell for the incident. The U.E. claims, however, that the action taken by the company was solely responsive to Chappell's personal upset and not to the wrongdoing of taking an employee away from her work station for approximately twenty-five minutes to discuss the U.E. and the association. It is undisputed that when Ms. Chappell and her steward, Ms. Pat Condon, complained to Mr. Day about the incident he listened attentively, stated that Rudolph had been wrong and asked if an apology would be acceptable. Ms. Chappell agreed that it would. Day immediately convened a meeting of Rudolph and his supervisor for the purpose of informing Rudolph that his actions were unacceptable and directing him to apologize to Chappell. The Board accepts on the evidence that Rudolph was specifically informed that taking an employee away from her work station during working hours was unacceptable behaviour. Additionally, a verbal warning relating to the incident is recorded in Rudolph's file. The event does not therefore conform to the characterization place on it by the U.E.

24. It is significant to the U.E.'s section 13 claim that the incident occurred prior to the time when the company clamped down on both unions for campaigning during working hours. In these circumstances, even if Rudolph's conduct had gone undisciplined it would not indicate that the employer was bestowing a special advantage on the Association or seeking to create a situation which would enable the Association's campaigning to be more effective than the U.E.'s. There is not the slightest suggestion in the evidence that the employer was anything but even-handed in dealing with the problem of both unions campaigning during working hours.

25. The U.E. further complains that favouritism for the Association was displayed during the campaign when Mr. Norm Forrest, the president of the Association, approached Ms. Judy Welch, the president of the U.E., at her work station during working hours in late November of 1980. The U.E. emphasizes that this discussion occurred after the warning memorandum of November 19, 1980 and maintains that if Welch had been at Forrest's work area she would have been disciplined. The U.E. argues that in failing to discipline Forrest for speaking to Welch about union business during working hours, the employer gave "support" to the Association within the meaning of section 13 of the Act.

26. It is common ground that the discussion which took place between Welch and Forrest concerned a proposal put forth by Forrest that he, as president of the Association, and Welch, as president of the U.E., should have an open debate so that all employees would have

an opportunity to hear both sides of the issues before the representation vote on December 2nd.

27. The Association maintains that under section 2.5 of the collective agreement between the Association and employer covering agreement between the Association and employer covering the office employees, the president of the Association is entitled to spend one hour per day on Association business. Accordingly, the Association argues, Forrest's discussion with Welch was not something for which he deserved to be disciplined. Quite apart from his rights under that collective agreement, the Association further maintains that Forrest's conversation with Welch did not fall within the scope of the company's memorandum of November 19, 1980 because it was not "campaigning", but rather a neutral proposal that would benefit all employees equally.

28. Whether or not the collective agreement entitled Forest to speak with Welch during working hours and whether or not the conversation would fall outside the company's memorandum of November 19th, the Board is satisfied that the event does not reflect employer "support" for the Association. If Forrest was wrong for engaging in a non-working conversation during working hours, then so was Welch. Accordingly, if the company was in fact aware of their discussion, a conclusion which does not emerge from the evidence, the Board would view the company's failure to discipline as even-handed treatment of both the U.E. and the Association. The Board, therefore, draws no inference of employer "support" for the Association from Forrest's conversation with Welch in late November of 1980.

29. Another matter complained of by the U.E. is that Forrest distributed leaflets on a number of occasions during his working hours without receiving discipline from the employer. During the campaign, the two unions fell into a pattern for the distribution of literature. The U.E. passed out leaflets in the morning prior to the commencement of work and the Association, from virtually the same spot at the company's gates, distributed its literature at the end of the plant employees' working day.

30. Forrest and two other persons who on occasion distributed Association literature were office employees. While hours in the plant end at 4:15 p.m., the office hours continue until 4:30 p.m. To effectively distribute campaign literature to plant employees, Forrest left the office fifteen minutes early on a few occasions. The Board accepts the uncontradicted and documented evidence that by prior arrangement with their supervisor, Forrest made up all time lost from leaving the office early. The Association again argues that Forrest was acting within his rights under the office collective agreement as he could use an hour a day for Association business.

31. Whether or not Forrest was entitled under the office collective agreement to take time off to distribute literature, the Board cannot conclude that the employer gave "support" to the Association within the meaning of section 13 of the Act by allowing Forrest on occasion to leave the office fifteen minutes early. Forrest was not given a free benefit. By prior arrangement, he made up the time. Additionally, the evidence does not suggest that through this arrangement the employer gave the Association an edge in its campaign. More importantly, there is no indication in the evidence that the employer treated the U.E. less favourably than the Association as would have been the case if the employer had denied the same arrangement to a U.E. campaigner making a similar request.

32. Another ground of complaint raised by the U.E. is that the employer paid Forrest a day's wages when he went to a labour relations conference. On November 6th and 7th, 1980 Forrest attended a labour relations conference entitled, "Negotiating a Collective Agreement". The Association does not dispute that Forrest was paid for one of the two days.

33. While Forrest was the president of the union seeking to displace the U.E., he was also the president of the union that already held bargaining rights for the office employees. No matter what the outcome of the Association's application for certification for the plant employees, Forrest, in November of 1980, was on the brink of entering negotiations for the office employees. It is not surprising, therefore, that he would go to a labour relations seminar on the subject of negotiating a collective agreement. When Forrest initially requested permission to attend the conference, he asked the company to pay both thue conference fees and his wages while away from work. The employer denied his request. Day testified, however, that upon reflection he decided that since Forrest and his associate were salary rated employees, they should be paid their wages for one day.

34. Once again, if the employer had been uneven in its treatment of the Association and the U.E. with respect to this conference, the Board would draw an inference adverse to the employer and the Association. There is no evidence, however, that the employer, for example, approached the Association to suggest attendance at the conference without making a similar suggestion to the U.E. The employer in fact took no initiative regarding the conference but rather reacted to an Association request. Notice of the conference was posted at the plant and a U.E. supporter could have requested to go. If the employer had received a request from a U.E. supporter to attend the conference but refused to bestow the same benefit given Forrest, the Board would draw an inference adverse to the company. No such request was made, however. The Board cannot conclude on the mere evidence that Forrest and another Association representative attended the conference under the arrangement set out above that the Association received "support" within the meaning of section 13 of the Act. The Association and the employer were in an ongoing and unchallenged bargaining relationship with respect to the office. A measure of accommodation between them therefore may be viewed as natural and of neutral effect with respect to section 13 of the Act. This is particularly true when, as in this situation, the employer has not exhibited unequal treatment in its dealings with the U.E. and the Association. In *Smith Beverages Limited*, [1975] OLRB Rep. Dec. 956, the Board commented that there is a natural spirit of cooperation that may develop between a trade union and an employer following certification which does not offend section 13 of the Act. At pp. 959-960 the Board said,

Before proceeding the Board would point out that the incumbent association has carried on a relationship with the respondent company as the certified bargaining agent of its employees for a number of years. A co-operative spirit may, and very often does, develop between the parties as a collective bargaining relationship matures which in no way lessens the union's effectiveness to represent the bargaining unit employees. The Board refers to such things as the use of company premises for meetings, the use of company offices by union officials, the movement within the work setting of union stewards, the interview of new employees by stewards and even dues check off. Prior to certification

any of these manifestations of an on-going relationship could serve as a bar pursuant to section 12 [now section 13] of the Act. Subsequent to certification, however, these activities may be provided for in a collective agreement or may become part of an accepted practice between the parties but they in no way diminish or destroy the status of the trade union.

(See also *Tri-Canada Inc.*, [1981] OLRB Rep. Oct. 1509 at para. 16.)

35. The final matter complained of by the U.E. in support of its primary position that the employer gave "support" to the Association is its allegation that the employer bargained with the Association in a violation of section 67 of the Act. Section 67 provides as follows:

67.-(1) No employer, employers' organization or person acting on behalf of an employer or an employers' organization shall, so long as a trade union continues to be entitled to represent the employees in a bargaining unit, bargain with or enter into a collective agreement with any person or another trade union or a council of trade unions on behalf of or purporting, designed or intended to be binding upon the employees in the bargaining unit or any of them.

(2) No trade union, council of trade unions or person acting on behalf of a trade union or council of trade unions shall, so long as another trade union continues to be entitled to represent the employees in a bargaining unit, bargain with or enter into a collective agreement with an employer or an employers' organization on behalf of or purporting, designed or intended to be binding upon the employees in the bargaining unit or any of them.

The U.E. maintains that subsequent to the Association's win of the representation vote on December 2, 1980 but prior to certification, the Association and the employer entered into negotiations on behalf of the plant employees.

36. If the Association's win of the representation vote had not been disputed by the U.E., the Association would have commenced simultaneous bargaining with the employer on behalf of both the plant and office employees. Hoping to combine the bargaining and anticipating that the results of the vote would be confirmed by this Board, the Association initially sought to delay the office bargaining until the instant matter had been resolved. With the passage of time, however, and under pressure from the office employees, the union commenced separate bargaining. The following Letter of Understanding was posted at the Association's request:

LETTER OF UNDERSTANDING

It is understood between Milltronics Limited and the Employee's Association of Milltronics Limited that in any Collective Agreement, individual articles of agreement and other articles which would affect employees later certified to be represented by the Association, would, upon notice of such certification, be open to re-negotiation.

Notice of a request to re-negotiate specific articles shall be supplied to the Company in writing within thirty (30) days of receipt of the certification notice.

Date "Feb. 4/81"

"Phillip G. Day"

Phillip G. Day,
Supervisor, Employee &
Community Relations

"N. Forrest"

N. Forrest,
President, The Employee's
Association of Milltronics
Limited.

37. When the Association held bargaining rights for both the plant and office employees, the collective agreements for each were combined into one document. Forrest testified that in 1981 when the Association commenced bargaining for the office employees, the Association wanted to make it very clear to the employer that any provisions that were bargained for the office employees would not have a binding effect on the plant employees. The Association would clearly not have been bound vis-a-vis the plant employees by clauses negotiated for the office employees. The Board concluded from the evidence, however, that the Association was concerned about such a possibility as the collective agreements for the two units had previously been grouped into one document. Having reviewed the evidence, the Board is satisfied that statements made about the production workers by the Association and the employer during the course of bargaining for the office employees were limited to caveats from the Association to assure itself that if it did become certified for the plant employees it would not be restricted in negotiating for the office employees. Exchanges of this nature in the circumstances of this case do not constitute either a breach of section 67 of the Act or "support" within the meaning of section 13.

38. Stepping back from the details of the evidence, we note that this Association did not first develop in the shadow of the organizing campaign of an established, broader based union. In this regard it is clearly distinguishable from *Square D Canada Electrical Equipment* [1980] OLRB Rep. Sept. 1324 and *Tri-Canada Inc.*, *supra*, at para. 22. The Association was originally certified by the Board in 1977 and entered into a collective agreement which operated for a year and one half before the U.E. sought to displace it in the plant. Contrary to the suggestion of the U.E., the evidence does not support the conclusion that the bargaining relationship the Association has developed with the employer is anything other than arms length.

39. For the reasons detailed above, the Board cannot conclude that the employer has rendered "support" to the Association. The Board therefore is not precluded from certifying the Association by virtue of the provisions of section 13 of the Act.

40. We turn then to the U.E.'s alternate argument concerning the employer's response to an award issued by a board of arbitration relating to union dues.

41. In May of 1980, a dispute arose between the employer and the U.E. over the

collection of union dues. Under the terms of the collective agreement in effect between the U.E. and Milltronics, all employees were required to pay union dues. It is common ground that five employees were not paying union dues thus giving rise to the policy grievance filed by the union. It is apparent on the face of the decision of the board of arbitration that prior to the arbitration, the employer had put before the offending employees dues authorization forms to be signed. The employer had not, however, further presented them with the alternative of "sign or be discharged" as requested by the U.E. The matter was not resolved in the grievance procedure and was processed through to arbitration. By a decision dated September 29, 1980, the board of arbitration held that the collective agreement placed upon the company an obligation to put employees to the choice of either paying dues or not retaining their employment.

42. The award did not bring an end to the dispute. On October 29, 1980, the company filed in the Supreme Court of Ontario notice of application for judicial review. On January 7, 1981, the Court issued an interim decision staying the execution of the award insofar as it required the discharge of employees for failing to pay union dues. Ultimately, in June of 1981, the Court upheld the award of the board of arbitration.

43. The employer as of the date of the representation vote on December 2, 1980 had not implemented the award. It had not in other words discharged any employee for failing to sign a dues authorization form. The U.E. maintains that the failure of the employer to discharge offending employees affected that outcome of the vote and that, accordingly, the Association's application for certification should be dismissed. The U.E. maintains that the average employee would have been aware of three critical factors: first, the clear language of the collective agreement requiring all employees to pay union dues; secondly, the award of the board of arbitration requiring the employer to present employees who were not paying dues with the choice of signing a dues authorization form or being dismissed; and thirdly, the fact that by the time of the vote the employer had not implemented this award. The union argues that an employee's awareness of these factors would cause a reasonable employee to feel that the U.E. was an ineffective bargaining agent.

44. The Board cannot conclude on the evidence that the employer's failure to discharge employees who had failed to sign dues authorization forms following the issuance of the award of the board of arbitration invalidates the representation vote taken on December 2, 1980. Well before the vote, on October 29, 1980, the employer applied for judicial review of the decision of the board of arbitration. Although the appeal was ultimately dismissed in June of 1981, the employer acted within its judicial rights in seeking review of the decision of the board of arbitration. If the average or reasonable employee may be presumed to have been aware of the three factors set out above, such an employee may also be presumed to have been aware of the employer's application for judicial review. In light of these events, the Board concludes that the typical employee on the date of the representation vote would not conclude that the employer had brought the U.E. to its knees by failing to implement the board of arbitration's award. Instead, the Board concludes that the average employee would have recognized that there was an ongoing dispute between the employer and the union over whether the employer was required to discharge employees for failing to sign dues authorization forms. The employer's reluctance to discharge employees pending a final disposition of the employer's appeal was vindicated on January 7th, 1981 when the Court issued a stay of the implementation of the award insofar as it required the employer to discharge employees who had not signed dues authorization forms.

45. An additional branch of the U.E.'s argument is that if by the date of the vote the five offending employees had been discharged as required by the award of the board of arbitration, the outcome of the vote may have been quite different as there may have been five fewer votes for the Association. There were 93 employees on the voters' list; only 74, however, cast ballots. It is impossible for the Board to know at this stage whether any employees who had not signed dues authorization forms on December 2, 1980 cast a ballot in the representation vote. Accordingly, the Board cannot conclude that if the employer had discharged them for failing to sign dues authorization forms the outcome of the vote would have been different. At the time of the vote the U.E. neither challenged the right of any employee to vote nor disputed the overall validity of the representation vote on this ground. If it had done so then, in a timely fashion, the ballots in dispute could have been segregated. Having failed to challenge the right of certain individuals to cast ballots then we cannot accept the union's argument now.

46. To summarize the Board's findings, we conclude that the employer did not render "support" to the Association within the meaning of section 13 of the Act and that the employer's response to the award of the board of arbitration did not affect the validity of the representation vote.

47. The Board finds that all employees of Milltronics Limited at Peterborough, save and except foremen, persons above the rank of foreman, office and clerical employees, accounting staff, salesmen, professional engineers, product specialists, field service personnel and students, constitute a unit of employees of the respondent appropriate for collective bargaining.

48. The Board is satisfied that not less than thirty-five per cent of the employees of the respondent in the bargaining unit were members of the applicant at the time the application was made.

49. On the taking of the pre-hearing representation vote directed by the Board, more than fifty per cent of the ballots cast were cast in favour of the Association.

50. A certificate will issue to the Association.

51. The Registrar will destroy the ballots cast in the pre-hearing representation vote taken in this matter following the expiration of 30 days from the date of this decision unless a statement requesting that the ballots should not be destroyed is received by the Board from one of the parties before the expiration of such 30 days period.

DECISION OF BOARD MEMBER OLIVER HODGES;

1. I dissent. The majority decision recites the evidence from which the conclusion to certify the applicant Association is derived. However, there is certain other evidence which weighs heavily against certification. Taken altogether, I conclude that the application for certification should be dismissed.

2. That this is a displacement application is extremely relevant. Obviously great weight must be accorded to events related to the employer, which may be seen to influence employee perception of the applicant Association or of the incumbent trade union. It is well documented by the evidence in this case that the respondent strongly favours the Association. Paragraph 9

of the majority decision makes that plain. That evidence must be underscored by the additional facts that those offensive letters to employees were on company letterhead and that the President of the respondent signed them.

3. Paragraphs 10 and 11 of the majority decision indicate that no weight is accorded to the letters signed by the company President as set out in paragraph 9. However, it is my opinion that the content of those letters, dated only a year before the present application, would have been vividly remembered by employees. Indeed, given the evidence of the incumbent trade union with its first collective agreement, it would be unusual if the employees failed to recall those letters without a "The Company President said so" recollection. The Association activity preceding the vote in the present application would serve to revive the influence of those letters. Whether challenged at the time they were distributed or not, those letters exist unchanged and continue to show the true face of the respondent. There is no evidence that the displacement of the Association by the U.E. in the first contest with the Association caused the respondent to change its spirit of ardent, overt and substantial support of the Association. There is absolutely no evidence nor any disclaimer by the Association at any time that the respondent support was unwelcome in any respect whatsoever. Having won certification in that first contest with the Association, it would have been counter productive for the U.E. to litigate the propriety of the respondent's support for the Association in that campaign. The U.E. was then proceeding to negotiate a first agreement and it would have been silly to harass the respondent while attempting to develop a harmonious bargaining relationship.

4. The majority in their decision, (paragraphs 20 and 21,) see the notice posted by the respondent on November 19th, 1980 as absolution for the support given to the Association up to that time in the present case. In fact, the notice posted by the respondent could not purge the minds of employees of what they already had seen of the free wheeling campaign activity of the President of the Association during his normal working hours. How could that happen without the support of the respondent? The answer is that the evidence discloses that the respondent did co-operate with the Association in its campaign to displace the incumbent U.E.

5. The majority decision (paragraphs 29, 30 and 31) excuses the accommodation made by the respondent which allowed Association President Forrest and other office bargaining unit employees to leave work on several occasions before their normal quitting time of 4:30 p.m., so that they could meet the plant bargaining unit employees coming off the day shift at 4:15 p.m. and hand out Association propaganda. The "other support" clearly evident in this accommodation is that the Association organizers "made up" their lost time during lunch breaks and by overtime. In paragraph 31 the majority of the panel hypothesizes that they would see the issue differently if the U.E. had been refused a like accommodation, had the U.E. made such a request. The fact is that the U.E. did not require special company approved arrangements to meet plant employees. The postulation of the speculative case by the majority of this panel is no justification for their line of reasoning condoning the make up of lost time utilized for campaign activity by the Association. This is a particularly relevant consideration in the circumstances of a displacement campaign. These facts alone are sufficient to trigger the sanction called by section 13 and require a dismissal of the application.

6. The provision in the Association collective agreement covering the office bargaining unit allowing company paid time during working hours for attending to Association business cannot by any reasonable interpretation be taken for purposes other than servicing the office

bargaining unit. Would the respondent allow the Association President under this provision to assist in the organization of an Association of employees of some other employer? And if that did happen, would this Board still consider this Association a trade union? Considering the majority decision in this case, the answer would be "yes", but in my opinion, the use of company paid time by the President while on Association business cannot have extended to campaign activity in the plant bargaining unit without attracting the sanction against "financial support" as required by section 13 and therefore dismissal of the application is required.

7. The majority observes (paragraph 34) that there is no evidence that the employer approached either the U.E. or the Association with regard to the labour relations conference offered by the University of Guelph and held on November 6 and 7, 1980, and therefore "other support" for the Association is not to be inferred. It appears to me, however, that the correct view of this matter requires the Board to find that there was an onus upon the respondent to offer the same attendance accommodation to both the Association representing the office bargaining unit and the U.E. representing the plant bargaining unit. There is no evidence that the respondent discharged that onus. Exhibit 25 is the announcement of the conference apparently posted by the respondent. It was introduced by counsel for the applicant through Mr. Forrest, President of the Association; it says in part:

"WHO SHOULD ATTEND

This workshop is for people in management and labour who are concerned with or responsible for the preparation, negotiation and day-to-day administration of the collective agreement. Experienced negotiators and those with a strong interest in employer/employee relations will also find the workshop of practical value."

Presumably, this Board is to understand that the respondent approved of attendance by its employees at the Guelph conference. Having agreed with the Association representing office employees to an accommodation for paid time off to attend the conference, it appears reasonable that the U.E., representing the plant employees, would be entitled to be advised and offered the same opportunity. Indeed, the respondent had an onus to do so if the "financial support" sanction of section 13 was to be avoided. There is no evidence that the respondent discharged this onus to deal with the applicant and the incumbent in an even handed manner in this matter. Having failed to show that it had dealt with both bargaining agents in a like manner, I conclude that "financial" and "other support" by the respondent was accepted by the applicant to its advantage in the plant bargaining unit contest and as a consequence certification must be denied as required by section 13 of the Act. In making this finding I am mindful of the testimony of Henry Osak regarding the conversation initiated with him while at work by Association President Forrest with regard to joining the Association, on Wednesday November 5, 1980. Forrest told Osak that the Company was sending himself to a course at Guelph to learn how to negotiate contracts, "and they would be sorry they sent him because he would learn so much about it". Osak was unshaken in this testimony when cross-examined by counsel for the applicant.

8. The impact Forrest made on Osak in this encounter during Osak's regular working hours has a sequel. Forrest is employed in the purchasing department of the respondent "in the front office". He advised Osak that he could get in touch on Monday when Forrest would have

returned from the Guelph course. On Monday, as required by his janitorial duties, Osak was vacuuming the front office carpets during the office lunch hour which Forrest was taking at his desk. Forrest asked Osak whether he had thought over their Wednesday discussion. Replying in the affirmative Osak asked for an Association application form, which Forrest gave to him (Exhibit 1). It is not filled in by an applicant, but the signature of "Hamilton" was on the form as collector when Osak accepted it with the intention of joining the Association. Osak knew Hamilton as an hourly worker. Forrest advised him "to complete and return the form to himself the next day with \$1.00 in cash — no I.O.U.'s." This intrusion into the regular working time of Osak went on for about 20 minutes. Osak testified that because of it he did not get all the carpets vacuumed. Further consideration caused Osak to change his mind and he did not join the Association nor return the application form to Forrest. The evidence of Forrest is that he had no other application forms pre-signed by a collector in his possession when he gave Exhibit 1 to Osak.

9. The majority in paragraphs 20, 21, 22, 23 and 24 sets forth their reasons and conclusions in dismissing the incumbent allegation of favouritism by the respondent toward the Association. Unlike the majority, I see the Rudolph-Chappel affair as indicating that Rudolph was quite sure of tacit freedom to campaign for the Association during working hours without fear of discipline by the respondent. Rudolph appeared to have the same kind of assurance as Forrest in the matter of campaign activity. The November 19th, 1980, posting of a notice by the company cannot expunge the effect of earlier campaign freedom for the Association which the evidence indicates to me is "other support" extended to the Association by the respondent.

10. The majority in paragraphs 41, 42, 43, 44, 45 and 46 deals with and dismisses the incumbent's allegation of "other support" for the Association evidenced by the refusal of the respondent to enforce the collective agreement requirement that employees authorize dues check-off as a condition of continued employment. However, as I see the evidence the effect of the protracted litigation of a very plain and simple requirement of the collective agreement by the respondent was to embarrass the incumbent and encourage employees in the plant bargaining unit to join the Association. I perceive that to have been the intention of the respondent, and therefore "other support" within the meaning of section 13.

11. Payment of dues by all employees in a bargaining unit is now required by law when requested, but there were decades of struggle against management condonation of the "free rider" who took the benefits won by the trade union but who refused to pay dues to support the bargaining agent. The respondent demonstrated an inexcusable atavism in this matter, with obstruction of the incumbent trade union and support for the applicant Association as the clear result.

12. The rationale of section 13 (formerly section 12) of the Act was outlined in one of the earliest cases involving that section. In *Edwards & Edwards Ltd.*, 52 CLLC ¶17,027 it was stated:

"The unfair practice sections of the Act, including section [56] which prohibit the type of employer conduct referred to in section [12], are, in large part, designed to safeguard the freedom of employees to join and to bargain collectively through the trade union of their own choice which is granted in section 3. That purpose is furthered by the provisions of

section [12] which places upon the Board the obligation to satisfy itself that no employer has meddled in the affairs of an applicant for certification. The section is clearly aimed at 'company-dominated' trade unions which are not entitled to be certified, on the theory that a trade union fostered by an employer cannot be considered as having been freely chosen by employees. The section designates conduct by means of which an employer might seek to confine the broad right conferred by section 3 and is therefore to be called into play where that purpose appears. We consider it is intended to be applied where employer activities are of such a character or are of such proportions that it is reasonable to infer that the employees have not exercised a free choice in the matter of selection of a bargaining agent, or where an employer has given material assistance to a trade union in connection with its organizational or other activities; where, in other words, the particular applicant is not truly the chosen bargaining agent of the employees concerned. It is argued that because of its explicit language, section [12] need only be literally construed and mechanically applied. We suggest that it can properly be interpreted only by reference to what is its obvious intent: to prohibit the certification of any trade union which, because of the nature of its relationship with an employer, is not qualified to act on behalf of employees in their relation with their employer."

The rationale expressed in *Edwards & Edwards, supra*, is clearly applicable to the facts and circumstances of the present case.

13. Considering all of the evidence and in the particular circumstances of this case, I find the Association to be the willing beneficiary of "financial" and "other support" coming within the sanctions imposed by section 13. I therefore find that the applicant Association may not be certified, and consequently the application must be dismissed.

**0716-81-R Hotel, Motel and Restaurant Employees Union,
Local 442, Applicant, v. Ontario 474619 Ltd., Respondent**

Sale of a Business – Employer engaging respondent company to manage its staff – Employer retaining ownership and control of physical plant – Respondent responsible for hiring, firing and supervision of employees – Respondent paid percentage of sales or profits – Whether contract out – Whether sale of part of a business.

BEFORE: M. G. Picher, Vice-Chairman, and Board Members M. J. Fenwick and W. H. Wightman.

APPEARANCES: *Alick Ryder for the applicant; J. A. Roffey and Harry Oakes Jr. for the respondent.*

DECISION OF THE BOARD; October 1, 1981

1. This is an application under section 63 of *The Labour Relations Act*. The applicant contends that the respondent 474619 Ontario Limited is the successor of Hoco Limited with respect to two restaurants operating as the Park Motel in Niagara Falls, Ontario.

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3. The applicant union is bargaining agent for employees of the Park Motel Hotel. The union and hotel are presently bound by a two-year collective agreement which will expire in January of 1982. At the time the agreement was entered into, the hotel had been operating two restaurants — one being a cafeteria style restaurant known as the Terrace Cafe, and the other being a pub called the Rathskeller. The employees in both restaurants were covered by the agreements. The two restaurants were operated on a seasonal basis in that they were both open only during the summer months. Towards the end of 1980, Hoco Limited, the company which owned the hotel, closed the two restaurants with the intention of renovating and re-opening them the following year on a full-time basis.

4. The restaurants were re-opened on June 1, 1981, with a number of changes. The Terrace Cafe now operates as a full service sit-down restaurant while the Rathskeller has become a discotheque called "Rumours".

5. On April 1, 1981, Hoco entered into an agreement with the respondent by which the respondent agreed to manage the staff of the newly renovated restaurants. The respondent specifically agreed to provide all necessary staff including supervisory staff. In return Hoco agreed to pay the respondent the greater of 10% of the gross liquor sales or 49% of the net profit. Even though the management fee was to be in the form of a percentage of either sales or profits, all revenues are received by Hoco and the respondent's management fees are then paid out of those revenues. Hoco is responsible for all other management decisions; it establishes hours, prices and all other policy for the two establishments. It also retains ownership and control of the physical plant, having itself decided upon and paid for all renovations. The respondent, on the other hand, is responsible only for the hiring, firing and discipline of all employees. The respondent pays and supervises the employees. Two or three of the employees who previously worked part-time for Hoco now work for the respondent. All other employees in the Motel continue to be employed by the Motel and are covered by the collective agreement with the applicant union.

6. The issue in this case is whether Hoco, by contracting with the respondent, has transferred any part of its business to the respondent. If it has, then the respondent, as a successor employer, is bound by the current collective agreement between the hotel and the union.

7. The union contends that section 63 is applicable to this case even though the employer appears to have contracted out the work. Counsel for the union argues that a transfer of the business should be inferred from the various benefits which have accrued to the respondent, namely, the right to share in the premises, the profits of the business and/or the benefits of the liquor license. In the view of the union's counsel these circumstances lead to the conclusion that there has been a transfer of something more than just a management function — that “something” being a part of Hoco's business.

8. Counsel for the respondent countered that this was simply a case in which the employer had contracted out some bargaining unit work. He referred the Board to previous cases, such as *Superior Sanitation Services Ltd.*, [1968] OLRB Rep. July 395, in which the Board has held that the contracting out of bargaining unit work does not constitute the transfer of a business within the meaning of section 63.

9. Sections 63(1) and (2) provides:

63.-(1) In this section,

- (a) “business” includes a part of parts thereof;
- (b) “sells” includes leases, transfers and any other manner of disposition, and “sold” and “sale” have corresponding meanings.

(2) Where an employer who is bound by or is a party to a collective agreement with a trade union or council of trade unions sells his business, the person to whom the business has been sold is, until the Board otherwise declares, bound by the collective agreement as if he had been a party thereto and, where an employer sells his business while an application for certification or termination of bargaining rights to which he is a party is before the Board, the person to whom the business has been sold is, until the Board otherwise declares, the employer for the purposes of the application as if he were named as the employer in the application.

10. The effect of these provisions is twofold. They would prevent an employer from suppressing a union's bargaining rights by assigning its legal status as employer through a transfer of the business. By the same token they preserve the expectations of employees that their bargaining rights will not be eroded simply because the identity of their employer has changed. These purposes were more fully explained in *Aircraft Metal Specialities Ltd.*, [1970] OLRB Rep. Sept. 702 at p. 704:

The purpose of section 47A [now section 55] becomes important in assessing the various fact situations that arise. Section 47A operates on a number of levels. The first level of course is to prevent the subversion of

bargaining rights by transactions which are designed to get rid of the union. We have encountered situations where there are transactions between various corporate entities which are in effect "Paper Transactions", and are a form of corporate charade engaged in for the purpose of eliminating the trade union. In this type of case the Board has liberally interpreted section 47A to preserve the bargaining rights and has attempted to look beyond "Paper Transactions" to achieve that purpose. See *E.G. Kem's Masonry*, Dec. 1964 OLRB, Mthly. Rep., 382 and *Trenton Riverside Dairy*, September 1964 (Unreported).

A further and important purpose of section 47A is to preserve the bargaining rights with respect to work which has accrued to the benefit of the employees as a result of their union becoming the bargaining agent through certification or voluntary recognition. Once the union had been recognized with respect to a particular business the union then obtains a right to bargain with respect to wages, hours and other conditions of employment in that business. The right to participate in the business and its functions in that manner is in the nature of a vested right and section 47A allows the union to pursue that bargaining right when all or part of the business is sold. In making determinations under section 47A therefore, the Board is interested in maintaining the bargaining rights where the sale involves a continuum of the business.

11. In most cases these considerations have led the Board to give a wide interpretation to the section and in particular to the meaning of the word "sale". In *Thorco Manufacturing Ltd.*, 65 CLLC ¶16,052, the Board explained at p. 787:

According to its strict signification, the term sells is usually taken to describe a transaction involving the disposal of property by one to another in consideration of a sum paid or agreed to be paid by the recipient in money or its equivalent. As used in section 47a, however, the word sells has been given a wide definition which includes lease, transfers and any other manner of disposition of the business or part thereof. In legal parlance the word lease generally denotes a specific kind of contract by which one party, called the lessor, for a consideration in money or its equivalent, confers on another, called the lessee, the exclusive possession of certain property for a period of time.

The word transfers, however, is obviously a term of wide significance and unless restricted by the context is capable of describing a multitude of transactions whether by sale, exchange, gift, trust or otherwise by which property, rights, or interests, etc. are transmitted absolutely, conditionally etc. or by operation of law from one person to another. We are unable to find anything in the language of the section to denote any legislative intention to restrict the meaning of the word transfers to any particular kind of transfer. Also, having regard to the particular language used and the remedial object sought to be attained by and the wide meaning which must be attributed to the preceding word transfers, it is our opinion that the generality of the words any other manner of

disposition is not intended to be in any way limited or interpreted ejusdem generis with the words leases, or transfers. In our opinion, it is more in harmony with the language of and the remedy envisaged by the enactment to interpret the words and any other manner of disposition as an omnibus or saving provision intended to include dispositions of the business or a part or parts thereof by any mode or means whatever which are not appropriately described by the preceding words which state that sells includes leases or transfers.

It is a rudimentary principle applicable to the construction of remedial legislation that, consistent with the language of the enactment, the interpretation which must be adopted is the one which best serves to advance the remedy and to suppress the mischief contemplated by the legislation. (See also section 10 of *The Interpretation Act* R.S.O. 160 c. 191). Having regard to this principle and to the fact that the language of the section is entirely susceptible of and in agreement with such a meaning, we are impelled to give the section a large and liberal rather than a narrow or restrictive construction.

12. The history of section 63, together with the extent to which this broad interpretation of it has been applied was further elaborated by the Board in *Metropolitan Parking Inc.*, [1979] OLRB Rep. Dec. 1193.

13. While section 63 has generally been interpreted liberally, the Board has limited the scope of the section in situations where work has been contracted out from one employer to another. Obviously contracting out involves a transfer of work but that of itself does not trigger the application of section 63. In such cases the Board is called upon to determine whether there has also been a transfer of a business, or part of a business, required by the section. This determination is not always an easy one to make, and conclusions in this regard can vary with the particular facts of each case.

14. In *Superior Sanitation Services Ltd.*, [1968] OLRB Rep. July 395, the employer-municipality contracted out its garbage collection work to the respondent, whom the union alleged was a successor employer. At p. 398 the Board held that:

In the circumstances of this case the corporation has not disposed of part of its business but has merely changed its method of carrying on such business by contracting with an agent to perform the tasks which it formerly performed by its own employees.

15. In *Clark Dairy Ltd.*, [1970] OLRB Rep. Aug. 601, the employer contracted out its milk delivery service to the respondent after its own drivers had gone on strike. Under the contract, the respondent was to supply both staff and necessary equipment including trucks. The employer was to pay the respondent \$8.00 for every hour that one of its trucks was on the road. Furthermore, the respondent was required not to solicit any business on its own. The Board, in finding that the respondent was a successor employer, stated at p. 605:

In this case although *Clark* carries on business as a dairy, part of its business consists in the delivery of a dairy product to various customers.

It is clear that by its arrangement with Lark [the respondent] it has disposed of a part of that delivery service. Its actions in so doing constitute a manner of disposition of a part of its business within the meaning of section 47A(1)(a)(b) of *The Labour Relations Act*.

16. In several more recent cases the Board has declared successorship in contracting out situations where there is evidence that the employer and contractor are in a non-arm's length relationship (*Culverhouse Foods Inc.*, [1977] OLRB Rep. Jan. 16; see also *Thunder Bay Ambulance Services Inc.*, [1978] OLRB Rep. May 467, where the Board declared successorship in a contracting out situation in which the knowledge and expertise of the successor was directly traceable to that of the predecessor).

17. In *British American Bank Note Company Ltd.*, [1979] OLRB Rep. Feb. 72, a company had contracted its job of printing Wintario tickets to its parent, which had in turn transferred the work back to the subsidiary. In finding that no sale had taken place, the Board pointed out that bargaining rights attach to the business itself and not to the work performed in that business. At p. 74 the Board explained:

... section 55 cannot be interpreted as guaranteeing to a bargaining agent an absolute right of property in the work performed by its members. Section 55 serves only to preserve bargaining rights that have become attached to a business entity so that when that business entity is transferred, either in whole or in part, those bargaining rights survive and bind the successor employer.

18. In *Metropolitan Parking Inc. (supra)* the federal government contracted the operation of its parking lot to an independent contractor. Upon the expiry of that contract, the operation of the lot was then contracted out to a second company. The Board had to determine whether there was a transfer of a business from the first company to the second. At p. 1210 the Board gave a detailed explanation of how a true contracting out situation might be distinguished from a sale of a business:

37. The present case involved a form of subcontracting, and subcontracting arrangements always involve the transfer of work. Work or services performed by A's employees within A's own organization are 'contracted out' to B, and B uses his own managerial skills, plant, equipment and 'know how' to supply to A, for a price, the product, services, facilities or components formerly produced by A's employees. A, therefore, is contracting for the use of B's economic organization in lieu of his own. A is generating a particular demand, or market, for B's product, and it is implicit in the arrangement that, thereafter, the two businesses will remain in a kind symbiotic relationship, bound together by close economic ties. The continuity of the work, and the preservation of a close economic relationship, between the two parties is implicit in subcontracting and does not, in itself, establish a transfer of all, or part, of a business. If it is clear on the evidence, however, that B is unable to fulfil A's requirements with his existing equipment or organization, and received from A a transfer of capital, assets, equipment, managerial skills, employees or know how, then the transaction no longer looks like

a simple contracting out of work. A may not be making use of B's economic organization, rather A may be transferring part of his economic organization to B (and recall that section 55 is triggered by the transfer of 'part of a business') or merely permitting B to make use of (A's) organization while retaining control and direction of the related economic activity. Of course, it is to be expected that when A phases out part of his operation there may be certain equipment or assets which are now surplus and which can be disposed of on the market. These assets may, as a matter of convenience, be purchased by B. None of these factors unequivocally demonstrates or foreclose the application of section 55 (or section 1(4).) If, however, 'but for' the transfer of such assets, licences, know how or property interests from A, B would be unable to fulfill the contract, then it is easier to infer a transfer of part of A's business — albeit a part which A no longer wishes to operate itself.

19. The Board went on to note that it was the federal government which set the fees and derived the revenues of the lot. Thus, while the lot's customers were the customers of the federal government, they were not the customers of the contractors. Their customer was the federal government. For these reasons the Board found that neither the first contractor nor government had transferred a business and that therefore, the second contractors were not successor employers.

20. The criteria set forth in *Metropolitan Parking* were recently applied in an unreported decision in *Kennedy Lodge Nursing Home*, Board File No. 0632-80-R. In that case the employer had contracted out its janitorial services to the respondent contractor. The Board noted that in *Raymond Côté*, [1968] OLRB Rep. Mar. 1211 it had defined 'business' to mean the "totality of an undertaking" including tools, equipment, management, personnel and their skills and goodwill. In concluding that *Kennedy Lodge Nursing Home* had not transferred part of its business the Board stated:

13. Kennedy's business was and is the operation of a Nursing Home, i.e., to provide food and shelter together with expert supervision and medical care of its customers. One of the essential ingredients to attaining its business objectives is that it requires work to be done in the form of janitorial and housekeeping services. Kennedy has determined that these services can best be provided by employing Cosmos which has demonstrated managerial expertise in this area, and which Kennedy obviously concluded was superior to its own managerial expertise in the same area. Nothing, tangible or intangible, moved from Kennedy to Cosmos other than the janitorial and housekeeping work which is now performed by Cosmos employees rather than Kennedy employees. There has been no change in the scope of nature of Kennedy's business. Kennedy has not disposed of a part of its business but had changed its method of accomplishing certain sub-functions in its business by relying on an agent to provide such services. There has been no change in 'totality of the undertaking' which comprises the business. It is true that work formerly done by employees of Kennedy who are covered by a collective agreement, is not done by employees of Cosmos. That, in itself, in the total circumstances of this case cannot be construed as a sale of part of a business within the meaning of section 55.

21. The Board in this case is now left with the task of determining whether Hoco Ltd. has transferred any part of its business to the respondent so that it should be declared to be a successor employer.

22. In the instant case, the payment of the respondent of a percentage of the gross liquor sales or profits is not of itself conclusive that there has been a sale of a business or of part of a business. Provisions of that kind are common in commercial contracts, notably in leases, and do not of themselves evidence the sale of a business. In the instant case the conditioning of the revenues of the respondent on the volume of sales or profits gives it some share in the risk of profit and loss. That is an obvious incentive to better service and could be one of a number of indicia of a joint venture between the respondent and the Motor Hotel for the purposes of section 1(4) of the Act (an issue touched on further below). It does not, of itself, establish that part of a business has been transferred within the meaning of section 63 of the Act.

23. In analysing the facts of this case it is important to bear in mind the meaning of the word "business" for the purposes of the Act. In *Metropolitan Parking Inc.* at pp. 1205-07 the Board usefully reviewed this aspect of section 63:

A business is a combination of physical assets and human initiative. In a sense, it is more than the sum of its parts. It is a *dynamic* activity, a 'going concern', something which is 'carried on.' A business is an organization about which one has a sense of life, movement and vigour. It is for this reason that one can meaningfully ascribe organic qualities to it. However tangible this dynamic quality, it is what distinguishes a 'business' from an idle collection of assets. This notion is implicit in the remarks of Widjery, J., in *Kenmir v. Frizzell et al.*, [1968] 1 All E.R. 414 — a case arising out of legislation similar to section 55. At page 418 the learned judge commented:

'In deciding whether a transaction amounted to the transfer of a business, regard must be had to its substance rather than its form, and consideration must be given to the whole of the circumstances, weighing the factors which point in one direction against those which point in another. *In the end, the vital consideration is whether the effect of the transaction was to put the transferee in possession of a going concern, the activities of which he would carry on without interruption.* Many factors may be relevant to this decision though few will be conclusive in themselves. Thus, if the new employer carries on business in the same manner as before, this will point to the existence of a transfer, but the converse is not necessarily true, because a transfer may be complete even though the transferee does not choose to avail himself of all the rights which he acquires thereunder. Similarly, an express assignment of goodwill is strong evidence of a transfer of the business, but the absence of such an assignment is not conclusive if the transferee has effectively deprived himself of the power to compete. *The absence of an assignment of premises, stock-in-trade or outstanding contracts will likewise not be conclusive, if the particular circumstances of the*

transferee nevertheless enable him to carry on substantially the same business as before.'

[Emphasis added]

Widjery, J. took the same approach as that adopted by this Board, concentrating on substance rather than form, and stressing the importance of considering the transaction in its totality. The vital consideration for both Widjery, J. and the Board is whether the transferee has acquired from the transferor a functional economic vehicle.

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There need not be a transfer of the entire business before section 55 comes into play. The successor rights provisions may also be triggered by the transfer of 'part of a business.' [See section 55(1).] This language suggests that that bargaining rights continue when something considerably less than 'the totality of the undertaking' has been transferred. Presumably the Legislature envisaged the preservation of bargaining rights where there is a severance and transfer of a discrete, cohesive portion of the economic organization or activities which comprise the totality of 'the business.' The Board has found a transfer of 'part of a business', where one of a chain of retail stores has been sold to a competitor (*Supercity Discount Foods*, [1979] OLRB Rep. Apr. 119; *Loblaws Groceries Ltd.*, [1973] OLRB Rep. Jan. 73); where there is a transfer of the right *and means* to produce one of the products formerly produced by the predecessor's business; (*Canac Shock Absorbers*, [1973] OLRB Rep. Oct. 508); where there was a transfer of certain milk delivery routes in a particular geographic area (*Borden Co. Ltd.*, [1970] OLRB Rep. Jan. 1244), and where there was a transfer of the oil burner installation and service branch of a firm which was primarily engaged in the sale and delivery of fuel oil (*Automatic Fuels Ltd.* [1971] OLRB Rep. May 515.)

In each of these cases the Board found that the predecessor had transferred a coherent and severable part of its economic organization — managerial or employee skills, plant, equipment, 'know how' and goodwill — thereby allowing the successor to serve the market formerly served by the predecessor. This economic organization undertook activities which gave rise to employment, and the terms of employment, together with the union's right to bargain about them, were preserved. The part of the predecessor's business which it no longer wished to continue provided the business opportunity which the successor was able to pursue to its own advantage.

24. In this case there has been no transfer of any physical assets, much less the transfer in whole or in part of a "functional economic vehicle". The Hotel is the sole decision maker as to what food and drink will be bought and sold. It alone decides the hours of business and the prices to be charged. The respondent would be powerless to prevent decisions by the Hotel in

these areas which could materially affect the volume of sales or profits and thereby reduce or increase its revenues. Like the management company in *Metropolitan Parking Inc.* the respondent has acquired an obligation to perform services for compensation. It would in our view be out of keeping with business reality and go beyond the contemplation of section 63 of the Act to conclude that by contracting to supply staff to the Motor Hotel's restaurant and disco the respondent has acquired part of a business. To acquire the right to perform services in the restaurant and disco is not to acquire a going concern, in whole or in part. The segment so split off is not a going concern that can stand alone, as contrasted for example with the sale of one of a number of stores in a supermarket chain or the severance of the manufacturing and retailing arms of a previously integrated business. For the foregoing reasons the application must be dismissed.

25. It should be noted that the Board draws no conclusions with respect to what its decision would be if the same facts had been the subject of an application under section 1(4) of the Act (a refinement of the Act which did not exist at the time of the decisions in *Thorco and Aircraft Metal*). In light of evidence suggesting a relationship in the nature of a joint venture between the Motor Hotel and the respondent, including evidence that the president of the respondent is a director of the company that operates the Motor Hotel, the Board specifically asked counsel for the applicant whether he wished to plead section 1(4) in the alternative. He categorically declined to do so. Since section 1(4) on its face requires some form of application to the Board, we can say nothing more in respect of that alternative.

26. The Board also makes no comment on whether as a matter of law Hoco Ltd. continues to be the employer of the persons employed in the restaurant and disco. We have concluded that there has been no transfer of a business within the meaning of section 63. It may be that there has also been no transfer of the employment relationship having regard to the numerous factors that may bear on the question of who is the true employer (cf. *Sutton Place Hotel*, [1980] OLRB Rep. Oct. 1538). On the limited evidence placed before the Board by the agreement of the parties, and no argument having been directed to that issue the Board can make no determination in that regard. That issue may, of course, fall to be determined in some further application or at arbitration.

0193-81-R; 0567-81-U Service Employees International Union,
Applicant/ Complainant, v. **Ottawa General Hospital**, Respondent.

Certification where Act Contravened – Change in Working Conditions – Interference in Trade Unions – Unfair Labour Practice – Retroactive wage increase prior to vote – Decision for increase made prior to application – Whether breach of freeze provision – Whether employer letters lawful exercise of right of free speech

BEFORE: R. D. Howe, Vice-Chairman, and Board Members M. J. Fenwick and W. H. Wightman.

APPEARANCES: *C. M. Mitchell and J. Nicholls for the applicant; M. P. Moran and R. Rivet for the respondent.*

DECISION OF THE BOARD; October 7, 1981

1. File No. 0193-81-R is an application for certification in which the applicant requested a pre-hearing representation vote. By decision dated May 15, 1981, another panel of the Board directed that a pre-hearing representation vote be taken in the following voting constituency (hereinafter referred to as the “bargaining unit”):

All office and clerical employees of the respondent in Ottawa, Ontario, save and except supervisors, persons above the rank of supervisor, secretary to the president, secretaries to vice-presidents and directors, secretaries to assistant vice-presidents and assistant directors, secretaries to chief of staff, director of medical education and administrative assistant, employees of human resources directorate, payroll clerks, persons regularly employed for not more than 24 hours per week, students employed during the school vacation period and persons covered by subsisting collective agreements.

In the vote that was taken pursuant to that direction, 86 ballots were marked in favour of the applicant and 134 ballots were marked against the applicant. There were also 2 spoiled ballots and 2 ballots that were segregated and not counted.

2. File No. 0567-81-U is a section 89 complaint in which the complainant union alleges that the respondent contravened sections 64 and 79 of the *Labour Relations Act* and requests certification under section 8. The complaint also requests various remedies under section 89 and requests that a new vote be ordered if certification pursuant to section 8 is not granted. However, on the final day of hearing of these matters, counsel for the union advised the Board that his client was only requesting certification without a vote and was withdrawing its request for any other relief. He further stated that if the Board was not prepared to grant certification pursuant to section 8, his client consented to the dismissal of these proceedings.

3. The essence of the applicant’s complaint is that the respondent breached the Act and unfairly influenced the outcome of the vote by including a substantial retroactive wage increase in the employees’ May 28, 1981 pay cheques and attaching to each of those pay cheques a letter from the President of the respondent with regard to the June 4, 1981 vote. The respondent, on the other hand, contends that it did not breach the Act by making the payment

in question. It is the respondent's position that it would have violated section 79 of the Act if it had failed to pay the increase to the employees on that date.

4. During the summer of 1980 the respondent began to operate a 450 bed teaching hospital which was originally called the Ottawa Health Sciences Centre General Hospital, but was later renamed the Ottawa General Hospital. (For purposes of convenience we will refer to that institution as the "new hospital".) At the same time the old Ottawa General Hospital (the "old hospital") ceased to be an active treatment hospital and became a chronic care facility known as Elizabeth Bruyère Health Centre (the "Health Centre"). Approximately 85% of the persons employed at the new hospital were previously employed at the old hospital. Their seniority at the old hospital was "voluntarily recognized" at the new hospital.

5. A wage increase effective from the commencement of the calendar year was given to non-unionized staff each year at the old hospital. The increase in 1980 was 4% effective January 1, 1980 with a further 4% increase effective April 1, 1980. In 1979, the increase was 7%. A number of such annual increases were not granted until after the beginning of a calendar year, but were always made retroactive to January 1st. A note or letter of explanation generally preceded or accompanied the payment of such increases at the old hospital.

6. The old hospital had collective agreements with the Canadian Union of Public Employees, Ontario Public Service Employees Union, International Union of Operating Engineers and Ontario Nurses Association. At the new hospital, the respondent voluntarily recognized and entered into collective agreements with the Canadian Union of Public Employees, Ontario Public Service Employees Union, and the Ontario Nurses Association. It also voluntarily recognized and entered into a collective agreement with the Canadian Union of Operating Engineers "instead of the International Union of Operating Engineers". The collective agreements that had been in force at the old hospital remained in force at the Health Centre.

7. Gloria King, a medical secretary employed by the respondent, testified that the applicant's organizing campaign began in November of 1980. Leaflets were distributed in the (new) hospital to interested employees after work and during coffee breaks and lunch hours. Several persons served as membership card collectors. In November of 1980, Raymond Rivet, who was at that time the respondent's Director of Human Resources, became aware that the applicant was attempting to organize the respondent's office and clerical employees. He also "heard remarks around December or January from supervisory staff" to the effect that union literature was being distributed among employees. However, he "thought the whole thing had fizzled out by February (of 1981)". The credibility of that statement is enhanced by the fact that only about 10% of the cards submitted by the applicant in support of this application are dated after February of 1981; over two-thirds of the cards were collected in November and December of 1980.

8. Members of the respondent's administration "started work on [1981] wage increases" in the fall of 1980 by surveying wage rates at other hospitals and gathering other pertinent data. Their deliberations culminated in a decision to recommend that salary scales for non-unionized employees (other than senior management) be increased by 10.5% for the period from January 4, 1981 to December 31, 1981. One of the bases of that recommendation was the fact that "close to 10%" had been offered to C.U.P.E. in "central negotiations"; the fact that the Ministry of Health gave the new hospital a 9.9% budget increase was also an

influential consideration. That recommendation was presented to the "Management Committee" of the respondent's administration in January or February of 1981 where it was approved for forwarding to the Personnel Committee of the respondent's Board of Trustees. On April 9, 1981, the Personnel Committee decided to recommend to the Board the proposed increase of 10.5%. As a result of that recommendation, the following motion "carried unanimously" at the April 21, 1981 meeting of the Board of Trustees:

"It was moved and seconded that the salary scales of non-unionized employees, except for senior management remuneration, be immediately revised to 10.5% for the period from 04/01/81 to 31/12/81. The percentage increase excludes fringe benefits which are to be part of a further study."

9. At a Management Committee meeting on the following day, Jean-Pierre Kingsley, the President of the respondent, reported that the Board of Trustees had approved the recommended salary increase. It was decided at that meeting that each of the four vice-presidents and the two directors would be responsible for advising their own staff of the increase. Yvon Vaillant (manpower planning specialist on loan to the respondent for two years from the Public Service of Canada), who became the respondent's Director of Human Resources in February of 1981, explained to the Board that this method of informing employees was decided upon because "everybody was anxious to know; the fastest was to have the vice-presidents and directors pass the word around."

10. On April 23, 1981 various members of management from the finance and human resources departments met to discuss the implementation of the increase. As a result of discussion concerning how long it would take to gather the necessary information, perform the required calculations (which involved 175 separate salary scales applicable to the "460 to 470" non-unionized employees) and otherwise process the necessary documentation, it was decided that the retroactive increase would be included in the employees' May 28th pay cheque. It was the uncontradicted evidence of Payroll Manager Charles Berube that the period of time between approval of the increase in question and payment thereof was similar to that which elapsed between approval and implementation of a retroactive increase for the employees in the C.U.P.E. bargaining unit, which involved approximately the same number of employees.

11. It is clear from the evidence that the amount and probable time of receipt of the increase were known by many, if not all of the employees in the bargaining unit before (Form 5) notices of this application were posted at the new hospital on May 1, 1981. Luc Bouchard, Director of the respondent's Patient Relations Centre, testified that he became aware in late March or early April of 1981 through friends in the finance department that the increase for non-unionized personnel would be about 10% and would probably be paid "in late May". Mr. Bouchard gave that information to his staff on April 16th at one of their regular monthly meetings. When he found out from his boss (the Vice-President of Paramedical Services) on April 24th that the increase would be 10.5% and that the staff would be receiving it "in two or three pay periods" (i.e. in four to six weeks), he immediately relayed that information to his staff. A number of other employees affected by this application were given similar information that day by Louise Cote, who was at that time the Assistant Director of Medical Records. It is clear from the evidence that this information spread rapidly through the hospital "grapevine" to the employees in question, who had been expecting a wage increase retroactive to the start

of the year, and had engaged in much general discussion among themselves concerning when they would receive it and how much they would be getting.

12. Mrs. King, who also became aware of the 10.5% retroactive increase on May 24, 1981, testified that "most people were surprised that it was so large" and that "most people thought that it was a good increase". She also testified, however, that she and a number of other employees who had moved from the old hospital to the new hospital "didn't think it was so large because [they] had taken a 7% decrease when [they] moved from the old to the new" since their hours were increased from thirty-five to thirty-seven and one-half hours per week without any change in salary. It is clear from her testimony taken as a whole that although the 10.5% increase was perceived to be a good increase "for employees who had started at the new hospital", it was not perceived to be a good increase by a number of the employees who had been employed at the old hospital before becoming employees of the new hospital. The evidence also indicates that at least 90% of the employees in the bargaining unit were originally employed at the old hospital before commencing employment at the new hospital.

13. About a dozen employees met with union official J. Nicholls on the evening of April 22, 1981, and decided to apply for certification by way of a pre-hearing representation vote "because [they] didn't have a majority". Most of the employees who had signed cards were told by the organizers or by other employees within the following three days that "there was going to be a vote".

14. The union filed its application for certification on April 24, 1981 and the respondent received notice of the application from the Board on May 1, 1981. In support of its application, the union submitted membership cards on behalf of approximately 41% of the employees in the bargaining unit. On May 8, 1981, the parties met with C. Robicheau, Labour Relations Officer, and agreed upon June 4, 1981 as the date for the representation vote.

15. On May 25th, the respondent distributed the following memorandum (in English and French) to each employee in the bargaining unit:

"To: FELLOW EMPLOYEES From: Head of Department

SUBJECT: *UNION MOVEMENT*

The Ontario Labour Relations Board has set Thursday, June 4, 1981 as the day for a secret ballot vote on whether or not you wish to be represented by the Service Employees International Union (S.E.I.U.). The election will be held from 0700 hours to 1100 hours and 1400 hours to 1600 hours in the Cafetorium A. We urge you to participate in this most important decision since a bare majority of the ballots cast will determine whether or not this union represents you.

No one representing either a union or management may interfere with you in reaching your decision.

You may hear a good deal about what the union says it will do for you; you ought to know that membership in a union also involves new obligations. Before committing yourself, you should carefully consider

the union's constitution and by-laws; what initiation fees, dues and special assessments may be levied, and whether joining a union may involve you in strikes and picketing.

If the union is certified, then by law it represents *all* employees in the bargaining unit. This means that whether or not you have signed a union card or supported the union, you will be represented by the union. The union may hold out the promise of many things such as higher wages and greater job security. Promises are easily made. You should bear in mind that all improvements in wages and working conditions are subject to negotiation between the union and management and are *not* effective unless *agreed* to by both sides.

You may wonder why the hospital does not express an opinion as to what decision you should make. You should not interpret our hesitancy to become involved and answer questions as a lack of interest. The hospital is concerned with your welfare, but we would not want to say anything that might be misconstrued as an attempt to interfere or unduly influence your decision.

Before casting your vote, you should obtain answers from the union seeking clarification to the following questions:

- a) What services will you receive for the monthly dues you will be required to pay?
- b) Do they have permanent representatives working in and out of the area who can deal with you in your official language?

We urge you to give this matter your most serious consideration in arriving at this most important decision."

The memorandum was drafted by Mr. Vaillant and signed by the employee's department head. It also contained the following postscript:

"Please be sure to vote on Thursday, June 4th."

16. Bargaining unit employees also received the following letter which was attached to their pay cheques on May 28, 1981:

"Dear employee:

In an earlier letter, your supervisor informed you that Service Employees International Union had applied to the Ontario Labour Relations Board to represent you in matters relating to your employment with this hospital. You were also informed that a secret ballot vote would be held on June 4, 1981 in the Cafetorium A between the hours of 0700 and 1100 and from 1400 to 1600 hours. This vote will be conducted and supervised by a representative of the Ontario Labour Relations Board.

By now, you should have seen the Ontario Labour Relations Board notices of the vote and the voting list which have been posted throughout the hospital.

Your name is included on the voting list and you will be directly affected by the outcome of the vote. That is, if the union is certified, then by law it represents all employees (including you) in the bargaining unit and not just those who have signed authorization cards or who support the union. The union will be certified if it obtains a bare majority of the *votes cast* by employees who actually vote on June 4, 1981.

No one representing either the union or management may interfere with you in reaching your decision on how you vote. However, in order that the result of the vote truly reflects the wishes of all employees in the bargaining unit it is imperative that you and every other eligible employee vote on June 4, 1981.

Sincerely yours,

(signed) Jean-Pierre Kingsley
President"

The pay cheques received by non-union employees that day, which was a normal pay day, included as a salary adjustment the 10.5% increase, retroactive to January 4, 1981. No letter or note of explanation concerning the salary adjustment was provided to employees by the respondent.

17. Although Mr. Vaillant was less than perfectly candid with the Board in his testimony during cross-examination with respect to the purpose of the memorandum dated May 25, 1981, the Board is of the view that in distributing the memorandum in question and the letter dated May 28, 1981 to employees, the respondent legitimately exercised its freedom to express its views under section 64 of the Act, and did not violate the Act by using coercion, intimidation, threats, promises or undue influence, or by engaging in other conduct prescribed by the Act (see *Greb Industries Limited*, [1979] OLRB Rep. Feb. 89, in which the Board considered the scope of the employer's "freedom to express his views" under section 64). Indeed, counsel for the applicant did not argue otherwise. However, as noted above, he did contend that the respondent violated section 64 of the Act by paying the retroactive increase to employees on May 28, 1981. It was his position that to avoid breaching the Act, the respondent should have waited and paid the increase on June 11, 1981, the next pay day after the vote. (Employees at the new hospital receive a pay cheque every second Thursday for the two week period ending on the previous Friday.)

18. The applicant seeks certification under section 8 of the Act, which provides:

"Where an employer or employers' organization contravenes this Act so that the true wishes of the employees of the employer or of a member of the employers' organization are not likely to be ascertained, and, in the opinion of the Board, a trade union has membership support adequate for the purposes of collective bargaining in a bargaining unit found by the

Board pursuant to section 6 to be appropriate for collective bargaining, the Board may, on the application of the trade union, certify the trade union as the bargaining agent of the employees in the bargaining unit.”

19. The initial issue which must be addressed in this case is whether the respondent has contravened the Act. Counsel for the applicant contended that by paying the retroactive increase to the employees in the bargaining unit a week before the vote, the respondent interfered with the selection of a trade union in contravention of section 64 of the Act, which provides:

“64. No employer or employers’ organization and no person acting on behalf of an employer or an employers’ organization shall participate in or interfere with the formation, selection or administration of a trade union or the representation of employees by a trade union or contribute financial or other support to a trade union, but nothing in this section shall be deemed to deprive an employer of his freedom to express his views so long as he does not use coercion, intimidation, threats, promises or undue influence.”

Counsel for the applicant argued that the respondent had paid the funds in conjunction with the vote in order to influence the outcome of the election. It is his position that this amounted to “buying votes” and that the impact of such conduct cannot be remedied by section 89 relief in conjunction with a new vote.

20. Counsel for the applicant cited a number of American cases in support of the proposition that an unconditional payment of monies prior to a representation vote for the purpose of impinging upon employees’ freedom of choice with respect to unionization constitutes an unfair labour practice. In the leading case in this area, *N.L.R.B. v. Exchange Parts Co.* (1964), 375 U.S. 405, the U.S. Supreme Court stated:

“[The National Labour Relations Act] prohibits not only intrusive threats and promises but also conduct immediately favorable to employees which is undertaken with the express purpose of impinging upon their freedom of choice for or against unionization and is reasonably calculated to have that effect. In *Medo Photo Supply Corp. v. Labor Board*, 321 U.S. 678, 686, this Court said: ‘The action of employees with respect to the choice of their bargaining agents may be induced by favors bestowed by the employer as well as by his threats or domination.’ Although in that case there was already a designated bargaining agent and the offer of ‘favors’ was in response to a suggestion of the employees that they would leave the union if favors were bestowed, the principles which dictated the result there are fully applicable here. The danger inherent in well-timed increases in benefits is the suggestion of a fist inside the velvet glove. Employees are not likely to miss the inference that the source of benefits now conferred is also the source from which future benefits must flow and which may dry up if it is not obliged. The danger may be diminished, if, as in this case, the benefits are conferred permanently and unconditionally. But the absence of conditions or threats pertaining to the particular benefits conferred would be of

controlling significance only if it could be presumed that no question of additional benefits or renegotiation of existing benefits would arise in the future; and, of course, no such presumption is tenable.

(See also *International Shoe Company v. United Shoemakers of America* (1959), 123 NLRB 682; 43 LRRM 1520; *J. C. Penney Co. v. NLRB* (1967), 66 LRRM 2069 and 2272 (U.S. Court of Appeals, Tenth Circuit); *Connecticut Foundry Co.* (1980), 103 LRRM 1496 (N.L.R.B.) and *Coronet Instructional Media* (1980), 104 LRRM 1470 (N.L.R.B.)) However, in *Micro Measurements* (1977), 96 LRRM 1402, the National Labour Relations Board held that an employer did not interfere with a certification vote where it implemented a planned increase prior to the vote without deviating from its planned course of action either with regard to the timing or the amount of the increase, and where there was no evidence that the increase was disproportionate to increases previously given by the employer.

21. In *Scythes & Company Limited*, 52 CLLC ¶17,018, this Board rejected as “a matter of conjecture” a submission, made on behalf of a trade union applying for certification, that employees would be less likely to vote in favour of the applicant in a representation vote where the employer granted an unconditional retroactive wage increase immediately before the onset of the “silent period”. The Board stated:

“As to the wage increase, it was granted without qualification when, for all the respondent knew, the employees were on the point of selecting the applicant as their bargaining agent. It was not a benefit conferred which was to be continued in effect or withdrawn depending on the outcome of the vote. The employees were not the less free to vote in favour of the applicant because they had received a wage increase.”

However, in *Arnold Steele, General Contractor*, [1966] OLRB Rep. Oct. 510, the Board found that “the action of the employer of granting a wage increase . . . following the filing of [the] application [for certification] not only casts doubt in turn upon the petition but also . . . renders it most unlikely that the true wishes of the employees would be disclosed by a representation vote.” Although we find the rationale contained in *Exchange Parts* case to be persuasive, it is unnecessary in the instant case for the Board to adopt that reasoning or otherwise attempt to reconcile the apparent conflict between the approaches applied in *Scythes* and *Arnold Steele* since the present case is distinguishable from both of those decisions in that it involves the implementation of a wage increase that was planned by the respondent and announced to employees before the respondent was notified of the application for certification. Thus, section 64 cannot be considered in isolation in the present cast, but rather must be read in conjunction with section 79(2) of the Act, which provides:

“Where a trade union has applied for certification and notice thereof from the Board has been received by the employer, the employer shall not, except with the consent of the trade union, alter the rates of wages or any other term or condition of employment or any right, privilege or duty of the employer or the employees until,

- (a) the trade union has given notice under section 14, in which case subsection (1) applies; or

- (b) the application for certification by the trade union is dismissed or terminated by the Board or withdrawn by the trade union.”

22. As stated by the Board in *St. Mary's Hospital*, [1979] OLRB Rep. Aug. 795, at paragraph 9, section 79(2) “manifests a legislative intent to maintain the prior pattern of the employment relationship in its entirety”. The Board has consistently accepted and applied a “business as before” approach in recent cases. In *Spar Aerospace Products Limited*, [1978] OLRB Rep. Sept., 859, at paragraph 23, the Board commented on the effect of that approach as follows:

“23. The ‘business as before’ approach does not mean that an employer cannot continue to manage its operation. What it does mean is simply that an employer must continue to run the operation according to the pattern established before the circumstances giving rise to the freeze have occurred, providing a clearly identifiable point of departure for bargaining and eliminating the chilling effect that a withdrawal of expected benefits would have upon the representation of the employees by a trade union. The right to manage is maintained, qualified only by the condition that the operation be managed as before . . .”

As illustrated by the Board’s decision in *Scarborough Centenary Hospital*, [1969] OLRB Rep. Jan. 1049, the existing pattern of an employment relationship may contain a prospective element. In that case the Board held that section 79(2) preserved not only the wages actually paid to employees at the onset of the freeze, but also any amounts promised prior to the freeze that were to be implemented within the period of the freeze. See also *Hostess Food Products Ltd.*, [1975] OLRB Rep. Mar. 210, in which the Board found that the employer contravened section 79(2) of the Act by failing to implement a substantial wage increase announced by the employer prior to the commencement of the freeze. To avoid the application of the freeze, the employer’s decision to increase wages must have been communicated to employees prior to the onset of the freeze period (see *Carleton University*, [1978] OLRB Rep. Feb. 184).

23. Having regard to all of the evidence, the Board finds that the decision to pay the retroactive increase on May 28, 1981 was made by the respondent before it received notice of the union’s application for certification on May 1, 1981. Moreover, we are satisfied that the decision to pay the retroactive increase to employees on May 28, 1981 or on June 11, 1981 was communicated by management to many of the employees affected by this application before the respondent received such notice.

24. In view of the Board’s jurisprudence, we are of the view that (in the absence of consent by the applicant to a delay in the implementation of the increase) the respondent was required by section 79(2) to pay the 10.5% retroactive increase to non-unionized employees on May 28, 1981 or on June 11, 1981, since the amount and timing of that retroactive increase had been promised to employees prior to the onset of the freeze. Moreover, we cannot accept the applicant’s contention that to avoid breaching section 64, the respondent should have delayed payment until after the vote by paying the retroactive increase on June 11, 1981 rather than on May 28, 1981. Although we are not called upon to express a final view on the matter in the instant case, there appears to be some merit in the respondent’s contention that it might have contravened the Act if it had intentionally delayed the implementation of the increase until after the vote. Such action might have given rise to a concern on the part of employees that voting for the union would result in the loss or indefinite postponement of the promised

increase. As Mr. Vaillant stated during cross-examination "not giving a retroactive pay increase that was due and which [the employees] knew was due could have influenced the vote." In any event, having regard to all of the evidence before us, including the fact that the respondent has evidenced its willingness to engage in collective bargaining by voluntarily recognizing four trade unions as the respective bargaining agents for four bargaining units at the new hospital and by entering into collective agreements with those unions, we are not satisfied that the respondent's payment of the 10.5% retroactive increase to employees on May 28, 1981 was prompted by anti-union considerations, which motivation is an essential element of the type of contravention of section 64 alleged by the applicant in this case (see *Skyline Hotels Limited*, [1980] OLRB Rep. Dec. 1811); rather, we find on the balance of probabilities that the respondent paid the increase on that date in accordance with a decision that had been made prior to the time that the respondent became aware of the union's application for certification, which decision was not reversed because of legitimate concern on the part of management that to delay payment of the retroactive increase until after the vote might itself be construed as an attempt to unduly influence the outcome of the representation vote. Although the increase was somewhat larger than the increase paid to employees at the old hospital in 1979 and 1980, we are satisfied on the evidence before us that the size of the 1981 increase was determined exclusively on the basis of legitimate financial considerations such as the level of increases to be paid to other employees and the funds available to the hospital.

25. For the foregoing reasons, the Board finds that the respondent did not contravene the Act. Thus, the application for certification without a vote pursuant to section 8 cannot succeed as the first prerequisite of that section has not been established. Moreover, even if we were of the view that the payment in question contravened section 64 of the Act, we would not in any event be inclined to grant a section 8 certificate in this case since the act of paying a retroactive wage increase to employees who are expecting such increase is not the type of conduct which would lead the Board to concluded in the circumstances in this case that the true wishes of the employees in the bargaining unit are not likely to be ascertained. However, it is unnecessary to consider whether this would be an appropriate case in which to set aside the original vote and direct a new representation vote since, as noted above, counsel for the applicant expressly withdrew the applicant's request for such relief and indicated that if the Board was not prepared to grant certification pursuant to section 8, his client consented to the dismissal of these proceedings.

26. For the foregoing reasons, these proceedings are hereby dismissed.

0643-81-R United Electrical, Radio and Machine Workers of America (UE), Applicant, v. **SGS Supervision Services Inc.** Qualitest Technical Division, Respondent.

Bargaining Unit – Practice and Procedure – Representation Vote – Whether employees part-time or students – Counting of single segregated ballot revealing identity – Board directing new vote

BEFORE: R. D. Howe, Vice-Chairman, and Board Members J. D. Bell and O. Hodges.

APPEARANCES: *Art Jenkyn and John Trufal for the applicant; D. Jane Forbes-Roberts for the respondent.*

DECISION OF R. D. HOWE, VICE-CHAIRMAN, AND BOARD MEMBER O. HODGES; October 29, 1981

1. By decision dated July 8, 1981, the Board directed that a pre-hearing representation vote be taken in this application for certification. The employees eligible to vote were “[a]ll employees of the respondent in the voting constituency on the 2nd day of July, 1981, who have not voluntarily terminated their employment or who have not been discharged for cause between the 2nd day of July, 1981, and the date the vote is taken”. The voting constituency specified in that decision was:

“All employees of the respondent engaged in pipe inspection, working out of the respondent’s premises at Welland, Ontario, save and except foremen, those above the rank of foreman, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period.”

Pursuant to that direction, a vote was taken on July 24, 1981, in which 20 ballots were marked in favour of the applicant, 20 ballots were marked against the applicant, and 4 ballots were segregated and not counted.

2. On August 21, 1981, the Board appointed an Officer “to check the employment records of those persons casting ballots which were segregated by the Returning Officer in the representation election of July 24th, and to report thereon to the Board.” A hearing was subsequently scheduled for the purpose of considering the representations of the parties concerning the Officer’s report. At that hearing, the Board also heard the submissions of the parties with respect to the appropriate bargaining unit.

3. Having regard to the submissions of the parties, the Board finds that all employees of the respondent engaged in pipe inspection, working at or out of the respondent’s premises at Welland, Ontario, save and except foremen, those above the rank of foreman, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period, constitute a unit of employees of the respondent appropriate for collective bargaining.

4. It was submitted on behalf of the applicant that the segregated ballots cast by J. Micheline and O. McCombs should not be counted because those persons were allegedly at all

material times regularly employed for not more than twenty-four hours per week. The applicant further contended that the segregated ballot cast by G. Ozog should not be counted since he was at all material times a student employed during the school vacation period. It was the applicant's position that the segregated ballot cast by J. Guitar should be counted since he was regularly employed for more than twenty-four hours per week at all material times.

5. At the hearing of this matter the respondent withdrew its contention that O. McCombs was regularly employed for more than twenty-four hours per week and conceded that his ballot should not be counted since he was at all material times regularly employed for not more than twenty-four hours per week.

6. Counsel for the respondent submitted that the ballot cast by J. Micheline should be counted because he was regularly employed for more than twenty-four hours per week at all material times. She further submitted that G. Ozog's ballot should be counted since, in her submission, he was a regular full-time employee and was not a student employed during the school vacation period. It was the respondent's position that the ballot cast by J. Guitar should not be counted because he was "hired as a part-timer".

7. The Board's well established practice with respect to determining whether a particular employee is "regularly employed for not more than twenty-four hours per week" was recently described by the Board as follows in *Westgate Nursing Home Inc.*, [1981] OLRB Rep. April 503, at paragraph 6:

"... In determining whether an employee is regularly employed for not more than twenty-four hours per week, the Board generally looks to the period of seven weeks immediately prior to the date of the application as a representative period in which to assess the number of hours worked by employees. If during four or more of the seven weeks examined a person works for not more than twenty-four hours per week, the person will generally be found by the Board to be a part-time employee (see *Trenton Memorial Hospital*, [1980] OLRB Rep. Jan. 116; *Ian Douglas Ltd. trading as Dryden Cleaners & Launderers*, [1971] OLRB Rep. Mar. 135; and *Syndenham District Hospital*, [1967] OLRB Rep. May 135). Thus, in disputed cases, the Board generally assigns an officer to examine the records of the employer to determine how many hours each employee in question worked in each of the seven (weekly) pay periods immediately preceding the date of the application. The use of data concerning hours worked taken from the employer's (weekly) pay records expedites the process by minimizing the calculations necessary to obtain the necessary information (since all employers are required by section 11 of *The Employment Standards Act*, 1974 S.O. 1974, c. 112, as amended, to make complete and accurate records in respect of each employee showing information including the number of hours worked by the employee in each week). By adopting the seven week rule, the Board has sought to assist the parties appearing before it in reaching agreement on the status of employees as full-time or part-time, and to permit the parties to know in advance with a reasonable degree of certainty which employees will be affected by a particular certification application. The seven week period is a guideline, not a 'hard and fast rule'. Thus, if the seven week period is

found to be ‘unrepresentative’ of the nature of an employee’s status (due to circumstances such as illness, accident or leave of absence), the Board may select another period of time that is more representative (see *Holiday Inn Yorkdale — Commonwealth Holiday Inns of Canada*, [1976] OLRB Rep. Nov. 709). However, as stated in *Trenton Memorial Hospital*, *supra*, at para. 7, ‘there is a substantial onus on any party requesting that the Board depart from procedures like the seven week guideline that are known, accepted and relied on by union and employers alike’.”

The Board applies the “seven week rule” not only to determine bargaining unit membership on the date of the application, but also to determine the eligibility of an employee to cast a ballot in a representation vote. In making the latter determination, the Board applies the seven week rule to each disputed employee on the date the vote was ordered (or on such other date as may be specified in the Board’s direction) *and* on the date the vote was taken, since to be eligible to vote in a representation election involving a full-time bargaining unit such as the one in the present case, an employee must have been regularly employed for more than twenty-four hours per week on both dates (see *Trenton Memorial Hospital*, [1980] OLRB Rep. May 805).

8. In the present case, some of the employees were on vacation for one or more of the weeks that would normally be relevant to the determination of the matter in issue in these proceedings. Neither party disputed that the appropriate response to that situation is to eliminate each such week from the determination and substitute therefor the preceding week. This is consistent with the approach described by the Board in *Holiday Inn Yorkdale* (*supra*) in which the Board stated (at paragraph 5):

“... in instances where within the seven week period an employee is absent from work due to illness, accident, vacation, a leave of absence, etc. etc. then that particular week can hardly be considered a relevant period with respect to the application of the guideline. In these instances the Board simply will entertain the parties’ representations as to what may constitute a more representative period and as a result thereof will make its computation upon being satisfied of a more accurate reflection of the employee’s employment status.”

9. Accordingly, having regard to the submissions of the parties and to the appropriate representative periods, the Board finds that J. Guitar was at all material times regularly employed for more than twenty-four hours per week and that J. Micheline was not regularly employed for more than twenty-four hours per week on the date the vote was taken.

10. G. Ozog who is the son of Michael Ozog, the Manager of the respondent, commenced employment with the respondent in January of 1980 while still attending school. From February of 1981 to the week ending July 17, 1981, he worked at least forty hours per week. The applicant trade union filed this application for certification on June 23, 1981. Mr. Ozog was listed as a “student” on Schedule B filed with the Board by the respondent. At the July 6, 1981 pre-hearing vote meeting, it was agreed between the parties that Mr. Ozog was a student excluded from the bargaining unit. At the record check meeting which the Board Officer held with the parties on August 31, 1981, Michael Ozog agreed that his son was a student who was returning to school in September.

11. It is only “students employed during the school vacation period” who are excluded from the bargaining unit (see generally, *United Co-operatives of Ontario, Owen Sound Retail Branch*, [1970] OLRB Rep. Dec. 954). A student who is employed during a period of time other than the summer vacation period will generally be included in a full-time bargaining unit if he or she is regularly employed for more than twenty-four hours per week (unless he or she is a student on a co-operative training program with a university: see *Lely Limited*, [1971] OLRB Rep. Aug. 539, and *Union Carbide Canada Limited Gas Products*, [1971] OLRB Rep. Aug. 464). In *Muskoka Board of Education*, [1975] OLRB Rep. March 209, at paragraph 7, the Board explained its policy concerning students as follows:

“The Board has been cautious in excluding students from the coverage of bargaining units. In many industries students are employed not only when they are released from their schools during the vacation period but throughout the entire year as well — on either a part-time or full-time basis. The latter employment relationship may be continuous or occasional. As a matter of policy the Board has excluded students employed during the vacation period but it has gone no further. Students employed during the vacation period have less in common with other more permanently employed persons and, importantly, have less of an impact on the year long employment opportunities of more permanently employed individuals. This cannot be said for students who are employed through the academic year as the fast-food chain restaurant cases attest. (See *MacDonald's Restaurants of Canada Ltd.* [1974] OLRB Rep. Oct. 755) . . .”

(See also *The Regional Municipality of Niagara, Homes for Senior Citizens*, [1973] OLRB May 257). However, just as a person who is a part-time employee during one period of time can become a full-time employee during another period of time (see *Westgate Nursing Home Inc.*, *supra*), a person who is employed as a student during the school vacation period can cease to be a student employed during the school vacation period if he or she continues to work for the employer beyond the school vacation period. Similarly, a person such as Mr. Ozog, who was not a student employed during the school vacation period at the commencement of his employment with the respondent, can subsequently become a student employed during the school vacation period. Having regard to all of the circumstances of this case, including the agreement of the parties at the pre-hearing vote meeting with respect to Mr. Ozog's status as of the date of this application, the Board finds that Mr. Ozog was at all material times a student employed during the school vacation period.

12. For the foregoing reasons the Board rules that J. Guitar was eligible to vote in the July 24, 1981 representation vote and that O. McCombs, J. Micheline and G. Ozog were not eligible to vote. However, the counting of Mr. Guitar's ballot would, in the circumstances of this case, reveal how he voted. The Board, when faced with a similar situation in *Empco Fab Ltd.*, [1980] OLRB Rep. Oct. 1391, directed that another representation vote be taken in order to preserve the confidentiality of the wishes of the individual in question. As noted in that case, at paragraph 6:

“All employees who participate in a representation election are entitled to a secret ballot vote. The parties before this Board know that when they agree to count the ballots in circumstances such as those in the instant

case they run the risk of the Board directing another representation vote in order to protect the secrecy of the wishes of the employees who cast segregated ballots. See *Corporation of the Township of Chinguacousy*, [1973] OLRB Rep. July 380 and *Super City Discount Foods Limited et al*, [1971] OLRB Rep. March 175.”

See also *Daheim Nursing Home Limited*, [1980] OLRB Rep. Nov. 1639, at paragraph 4, in which the Board stated:

“Strong feelings for or against are not uncommon when a union seeks to be certified as the bargaining agent in a particular work place. No matter which way their sympathies may lie the disclosure of the wishes of individual employees during the certification process can subject them to pressure and recrimination at the hands of their employer and to ostracism at the hands of their fellow employees. That is why the right of confidential selection must remain paramount in the certification process whether it be through the secret ballot or through the confidentiality of membership evidence and statements of employee opposition filed with the Board, expressly protected by section 100(1) of *The Labour Relations Act*. That right must be jealously safeguarded if employees, employers and unions are to retain confidence in the certification process administered by this Board.”

13. Accordingly, the Board directs that another representation vote be taken of the employees of the respondent in the bargaining unit. All employees of the respondent in the bargaining unit on the date hereof who do not voluntarily terminate their employment or who are not discharged for cause between the date hereof and the date the vote is taken will be eligible to vote. Voters will be asked to indicate whether or not they wish to be represented by the applicant in their employment relations with the respondent.

14. The matter is referred to the Registrar.

DECISION OF BOARD MEMBER J. D. BELL;

1. I disagree with the decision of the majority that G. Ozog is to be classified as a student employed during the school vacation period and therefore is denied the right to cast a ballot at the representation vote.

2. Ozog was employed for a continuous period of 23 weeks prior to the voting day, July 24, 1981, as a full-time employee. He should not be changed from full-time status to student status by a statement that he may go to or return to school in the future. An agreement of the parties at the pre-hearing vote meeting should not deprive Ozog of his rights without his consent.

3. Therefore, I would count his ballot.

0330-81-JD Toronto-Central Ontario Building and Construction Trades Council and United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 46, Complainants, v. **Simcoe Mechanical Contracting Limited** and Christian Labour Association of Canada, Respondents, v. Mechanical Contractors Association of Toronto, Intervener #1, v. Mechanical Contractors Association of Ontario, Intervener #2.

Jurisdictional Dispute – Practice and Procedure – Complainant seeking to amend relief claimed and work description – Whether amendment of relief claimed permitted by Board's rules – Whether Board having jurisdiction to permit amendment of work description

BEFORE: R. A. Furness, Vice-Chairman, and Board Members D. B. Archer and J. Wilson.

APPEARANCES: *A. M. Minsky, Wm. Howard, Tom Wilson and M. Lloyd for the complainants; Wm. R. Herridge, Q.C., Elizabeth Forster, Kerry Lee and Edw. Vanderkloet for Christian Labour Association of Canada; Gary Graham for Simcoe Mechanical Contracting Limited; G. Grossman and R. A. Werry for interveners #1 and #2.*

DECISION OF THE BOARD; October 9, 1981

1. In a complaint which was filed on May 14, 1981, the complainants have requested that the Board issue a direction under section 91 of the *Labour Relations Act* with respect to the assignment of certain work. In a decision dated July 8, 1981, the Board held that it had jurisdiction to entertain this complaint.

2. On September 9, 1981, the parties to this complaint signed an agreed statement of facts. It is the expectation of the Board and the parties that the agreed statement of facts will substantially reduce the amount of *viva voce* evidence before the Board.

3. After the presentation of the agreed statement of facts to the Board, the complainants made two motions to the Board. In the first motion the complainants sought to amend the relief claimed as set forth in their letter dated June 3, 1981, by adding the following paragraph:

An order that the Board alter the bargaining unit defined in any collective agreement between the Respondents which purports to include the recognition by Simcoe of CLAC as bargaining agent for plumbers and plumbers' apprentices in O.L.R.B. geographic area no. 8 by excluding and removing such recognition of CLAC in and for the said geographic area no. 8 and by amending such collective agreement accordingly.

4. In the second motion the complainants sought to amend the description of the work contained in paragraph four of the complaint to the following description:

4. Detailed description of the work in dispute: All mechanical construction work at the Town of Vaughan's municipal administration building

expansion project, Major MacKenzie Drive, Maple, Ontario ("the Project") consisting of the following work:

(a) *Site Services and Plumbing and Drainage:*

The handling, fabrication and installation of the complete plumbing and drainage systems as outlined in Sections 152 00 and 154 00 of the specifications and approved drawings provided for the Project, including:

- (i) All sanitary and storm sewers inside the building and outside to the nearest manhole, main gathering sewer, or property limit, whichever is nearest to the building.
- (ii) All water and fire mains within the property lines as shown on approved drawings, etc. and handling and installation of all fire hydrants including feed lines from the hydrants to the building.
- (iii) All waste, vent, hot and cold water piping systems including all work involved in the extension of existing systems and the removal, relocation and/or installation of all fixtures and equipment required in Section 154 00 of the specifications and the accompanying drawings.
- (iv) All piping systems supplemental to the plumbing systems, i.e. soap dispenser system, natural gas systems and appliances.
- (v) All water-heaters, heat exchangers, pumps, tanks, circulators, access covers, gauges and thermometers, escutcheons, anchors, hangers, brackets and supports.

(a) *Heating and Cooling Systems:*

The handling, fabrication and installation of all piping systems and related equipment for a complete heating and cooling system, as required by Section 156 00 of the specifications, including:

- (i) All piping required for the heating/cooling systems and condenser water systems including heat reclamation system and water treatment system.
- (ii) All boilers, pumps, chillers, heat pumps, heat exchangers, storage tanks, coils, whether heating, cooling, preheat or reheat, condenser equipment, cooling tower, as required in Section 156 00 of the specifications.
- (iii) All valves, expansion joints, flanges, chemical feed equipment, strainers, vents and vacuum breakers, pressure regulators, flexible connections, expansion tanks as required to complete all piping systems, including anchors, brackets and supports.

(iv) All fin-coil, fan-coil or other radiation which is part of a piping system.

(c) *Ventilation:*

(i) The installation of all piping and related pumps or other equipment that may be required for the supply of spray-water, drains from drip-pans or dehumidifiers or drain-tank.

(ii) The handling and installations of packages air-handling units using piping coils as a means of heat-transfer either liquid-to-air or air-to-liquid and of all fan-coil units as provided in Section 158 00 of the specifications and on approved drawings.

(d) *Sleeving, Drilling and Cutting Holes:*

The sleeving and drilling of all holes required in floors or walls of the building for the installation of any or all of the piping systems outlined above.

(collectively referred to as "the Work"). For purposes of clarification, the Work does not include the thermal insulation of and covering of piping, fittings, pumps, valves, boilers, ducts, flues, tanks, vats or equipment.

5. In the complaint which was filed on May 14, 1981, the complainants described the work in dispute as follows:

4. Detailed description of the work in dispute: All mechanical construction work at the Town of Vaughan's municipal administration building expansion project, Major MacKenzie Drive, Maple, Ontario ("the Project") consisting of the following work:

(a) Site services, plumbing and drainage, including the handling, fabrication and installation of complete plumbing and drainage systems;

(b) The handling, fabrication and installation of all piping systems and related equipment for heating/cooling systems;

(c) Ventilation, including the installation of all piping and related pumps or other equipment;

(d) Fire protection, including the handling, fabrication and installation of the fire hose and standpipe systems;

(e) Sleeving, drilling and cutting holes, including the sleeving or drilling of all holes required in floors or walls for the installation of such piping systems as above;

(collectively referred to as "the Work"). For purposes of clarification, the

Work does not include the thermal insulation of an covering of piping, fittings, pumps, valves, boilers, ducts, flues, tanks, vats or equipment.

6. In the agreed statement of facts the nature of the work is set forth as follows:

IV

NATURE OF WORK

18. The work to be performed by Simcoe with its own work forces for the Town of Vaughan was as follows, except as otherwise noted:

1. Site Services and Plumbing and Drainage:

The handling, fabrication and installation of the complete plumbing and drainage systems as outlined in Sections 152 00 and 154 00 of the specifications and approved drawings provided for the Project, including:

- (a) All saintary and storm sewers inside the building and outside to the nearest manhole, main gathering sewer, or property limit, whichever is nearest to the building.
- (b) All water and fire mains within the property lines as shown on approved drawings, etc. and handling and installation of all fire hydrants.
- (c) All waste, vent, hot and cold water piping systems including all work involved in the extension of existing systems and the removal, relocation and/or installation of all fixtures and equipment required in Section 154 00 of the specifications and the accompanying drawings.
- (d) All piping systems supplemental to the plumbing systems, i.e. soap dispenser system, natural gas systems and appliances.
- (e) All water-heaters, heat exchangers, pumps, tanks circulators, access covers, gauges and thermometers, escutcheons, anchors, hangers, brackets and supports.

2. Heating and Cooling Systems:

The handling, fabrication and installation of all piping systems and related equipment for a complete heating and cooling system, as required by Section 156 00 of the specifications, including:

- (a) All piping required for the heating/cooling systems and condenser water systems including heat reclamation system and water treatment system.

- (b) All boilers, pumps, chillers, heat pumps, heat exchangers, storage tanks, coils, whether heating, cooling, preheat or reheat, condenser equipment, cooling tower, as required in Section 156 00 of the specifications.
- (c) All valves, expansion joints, flanges, chemical feed equipment, strainers, vents and vacuum breakers, pressure regulators, flexible connections, expansion tanks as required to complete all piping systems, including anchors, brackets and supports.
- (d) All fin-coil, fan coil or other radiation which is part of a piping system.

3. *Ventilation:*

- (a) The installation of all piping and related pumps or other equipment that may be required for the supply of spray-water, drains from drip-pans or dehumidifiers or drain-tank.
- (b) The handling and installations of package air-handling units using piping coils as a means of heat-transfer either liquid-to-air or air-to-liquid and of all fan-coil units as provided in Section 158 00 of the specifications and on approved drawings.

4. *Central Systems:*

The handling, fabrication and installation of all or any pneumatic control systems which may be required to control any of the piping systems outlined above, including the handling and installation of all equipment, instruments and control panels.

This work has been contracted to Robertshaw Controls (Canada) Ltd. which is bound by the Provincial Agreement. It is common practice in the industry to subcontract such central systems work to such specialized contractors.

5. *Sleeving, Drilling and Cutting Holes:*

The sleeving or drilling of all holes required in floors or walls of the building for the installation of any or all of the piping systems outlined above.

19. Fire protection, including fire hose and standpipe systems, was not included in the tenders submitted by mechanical contractors nor in the contract between the Town of Vaughan and Simcoe. However, the fire hydrants and feed lines from the hydrants to the building were included in the mechanical sub-contract bids, and in the contract between the Town of Vaughan and Simcoe. Subsequent to the execution of the contract between the Town of Vaughan and Simcoe, arrangements were

made between the parties to the contract to delete the solar panels from the contract. Simcoe's original bid was for \$894,900 but the final contract price was \$851,000. The parties agree that the work referred to in paragraphs 16 and 18 above is plumbers' and pipefitters' work.

7. It was the position of the complainant that the first motion might be granted under section 58 of the Board's Rules of Procedure. With respect to the second motion, the complainant argued that the amended description resulted from ascertaining the truth of the precise nature of which work was being performed by the members of the respondent Christian Labour Association of Canada (CLAC). It was the position of the complainants that there was no surprise factor in its second motion and that the amendment which it was seeking was merely a particularized and clarified version of the nature of the work set forth in the complaint as modified by its subsequent greater knowledge of the work which was actually being performed.

8. The interveners supported the complainants in their motions and argued that the complainants had made the first motion in a timely fashion and that such a motion was expressly contemplated in the Board's Rule of Procedure. With respect to the second motion, the interveners argued that there was no merit to be gained from differentiation on a technicality. The interveners emphasized that the complainants were seeking the work performed by Simcoe Mechanical Contracting Limited ("Simcoe") with members of CLAC. In the view of the interveners it was in the interest of all parties that the precise nature of the work in dispute be resolved at this stage of the hearing.

9. Simcoe did not oppose the second motion. In opposing the first motion, Simcoe characterized this complaint as essentially a representation issue in which the complainants were attempting to displace CLAC as the bargaining agent for its employees. In view of Simcoe the Board does not have jurisdiction to entertain the first motion.

10. CLAC opposed both of the complainants' motions. CLAC described the first motions as not being with respect to an assignment of work but as an attempt to run CLAC out of the Board's geographic area #8 and argued that the Board had no jurisdiction to do this under section 91. CLAC argued that the Board should not consider an amendment which is not sustainable at law and that if the amendment is allowed and the scope clause is amended so as to exclude the Board's geographic area #8 from the description of the bargaining unit then certain employees would not be represented by any trade union. In the view of CLAC, the Act does not permit such a result. CLAC adopted the position that it was the complainants' letter to Simcoe which gave the Board jurisdiction under section 91(1) and July 8, 1981, the complaint was with respect to work and not whether the complainants are able to work and not whether the complainants are able to run CLAC out of the Board's geographic area #8. CLAC referred to section 91(15) and argued that it is triggered by a direction from the Board under section 91(1) with respect to particular work. CLAC viewed section 91(15) as giving the Board the power to alter a bargaining unit only to the extent that it is necessary to give effect to a direction of the Board under section 91(1). The operation of section 91(15) was interpreted by CLAC to be tied to the particular work referred to in a particular complaint. CLAC argued that section 91(15) did not give the Board the power to make the extraordinary wide order sought by the complainants in their first motion. With respect to the second motion, CLAC argued that the letter from the complainants to Simco triggered the jurisdictional dispute and that the jurisdictional dispute could not be expanded subsequently by the complainants. In the

view of CLAC, the complainants ought to be limited to the terms of their complaint as originally made to the Board and to Simcoe.

11. At the conclusion of the argument the Board ruled that the two motions of the complainants were granted and that written reasons would be provided, if requested by any of the parties. CLAC requested written reasons. These reasons are now set forth.

12. Section 58 of the Board's Rules of Procedure provides as follows:

An application, reply, intervention, complaint, statement of desire to make representations or notice may be amended before or at the hearing by leave of the Board upon such terms and conditions as the Board considers advisable.

13. With respect to the first motion, the complainants at this stage are merely requesting an additional form of relief in the framing of their complaint. The fact that a party to a proceeding before the Board requests certain relief does not, of course, mean that such relief will be granted by the Board. CLAC and Simcoe have addressed arguments to the Board which go to the merits of this complaint rather than to the form of the complaint. Arguments which go to the merits of a request for relief are clearly premature at the commencement of a hearing which is being held in order to determine the merits of the request for relief by the complainants. In our view, the complainants may frame their complaint so as to request relief under section 91(1) and (15) and the issue of whether such an amendment is sustainable at law is to pre-judge the merits of the complaint. The Board is not prepared to reach a conclusion on the sustainability at law of an amendment until it has heard all of the evidence and argument. The Board does have jurisdiction to entertain the first motion. In addressing argument to the Board, it appears that Simcoe was re-arguing questions of jurisdiction which were argued before the Board on June 10, 1981, and which were decided by the Board in its decision dated July 8, 1981. Clearly the Board has jurisdiction to permit the complainants to amend their complaint under section 58 of the Board's Rules of Procedure. The form of relief, if any, which may be granted to the complainants may be argued when all of the evidence has been adduced before the Board.

14. With respect to the second motion, the Board finds that the complainants are seeking to set forth in greater particularity the work which is in dispute. It is surely in the interest of all the parties that all of the issues in dispute be litigated before the Board on one occasion rather than have additional jurisdictional disputes on other aspects of the work which is being performed. The wisdom of this approach is appreciated by Simcoe. The complainants have stated in general terms the essential nature of the work in dispute in their letter to Simcoe and in the complaint which was filed with the Board on May 14, 1981. The second motion is a response by the complainants to a greater degree of understanding of the work which is in dispute. The Board has jurisdiction to permit the amendment contained in the second motion.

15. For the foregoing reasons the Board granted the two motions of the complainants.

0365-81-U Donald Lawrence, Complainant, v. Sonic Transport Systems Limited, Respondent.

Discharge for Union Activity – Practice and Procedure – Unfair Labour Practice – Union activist discharged – Whether anti-union animus – Whether delay in filing complaint resulting in dismissal – Whether delay affecting compensation

BEFORE: R. D. Howe, Vice-Chairman, and Board Members of C. G. Bourne and H. Simon.

APPEARANCES: *Eva Ligeti and Brian Iler for the complainant; Adrian Hill and Harold Johnson for the respondent.*

DECISION OF THE BOARD; October 19, 1981

1. This is a complaint under section 89 of the *Labour Relations Act* in which the complainant alleges that he was discharged by Harold Johnson, the President and General Manager of the respondent, contrary to the provisions of section 66(a) of the *Labour Relations Act*.

2. Section 66(a) provides:

“No employer, employers’ organization or person acting on behalf of an employer or an employers’ organization,

(a) shall refuse to employ or to continue to employ a person, or discriminate against a person in regard to employment or any term or condition of employment because the person was or is a member of a trade union or was or is exercising any other rights under this Act; . . .”

Also relevant to this complaint is section 89(5) of the Act which provides:

“On an inquiry by the Board into a complaint under subsection (4) that a person has been refused employment, discharged, discriminated against, threatened, coerced, intimidated or otherwise dealt with contrary to this Act as to his employment, opportunity for employment or conditions of employment, the burden or proof that any employer or employers’ organization did not act contrary to this Act lies upon the employer or employers’ organization.”

3. In the *Barrier Examiner* case, [1975] OLRB Rep. Oct. 745, the Board stated:

“. . . the effect of the reversal of the onus of proof is to require the employer to establish two fundamental facts. First, that the reasons given for the discharge are the only reasons and, second, that these reasons are not tainted by any anti-union motive. Both elements must be established on the balance of probabilities in order for the employer to establish that no violation of the Act has occurred”.

It is not the function of the Board in the present case to decide whether or not the respondent

had just cause to discharge the complainant. Our jurisdiction is limited to determining whether the respondent discharged the complainant because he was a member of a trade union or was exercising any other rights under the Act (see *Toronto Star Limited*, [1971] OLRB Rep. Sept. 582, paragraph 11). This does not however, preclude the Board from considering the context surrounding the respondent's actions, as indicated by the Board in *Fielding Lumber Company*, [1975] OLRB Rep. Sept. 665, at paragraph 19:

"The Ontario Labour Relations Board has no general mandate to impose its views of fairness on employers and employees. Its sole responsibility is to administer and enforce *The Labour Relations Act* — a piece of legislation that does not stipulate that an employee can be terminated from his employment only for just and reasonable cause. But having said this it must be observed that in assessing an employer's declared motivation due regard may be had to the peculiarities of the context surrounding an employer's actions. To the extent that peculiarities exist and cannot be reasonably explained an employer may fail, by a process of inferential reasoning, to satisfy the burden placed upon it."

The nature of the determination to be made in cases such as the instant case and the factors to be considered by the Board in making such determination are described as follows in *Pop Shoppe (Toronto) Limited*, [1976] OLRB Rep. June 299, at paragraph 5:

"In cases such as these the Board is very often required to render a determination based on inferential reasoning. An employer does not normally incriminate himself and yet the real reason or reasons for the employer's actions lie within his knowledge. The Board, therefore, in assessing the employer's explanation must look to all of the circumstances which surround the alleged unlawful acts including the existence of trade union activity and the employer's knowledge of it, unusual or atypical conduct by the employer following upon his knowledge of trade union activity, previous anti union conduct and any other 'peculiarities'. (See *National Automatic Vending Co. Ltd.* case 63 CLLC 16,278) . . ."

(See also *Mount Forest Caskets Limited*, [1980] OLRB Rep. June 853; *B & S Furniture Manufacturing Limited*, [1980] OLRB Rep. May 745; and *ABC Day Nursery and Kindergarten Limited*, [1980] OLRB Rep. April 391.) With those general principles in mind, the Board must now consider the facts of the present case.

4. During the course of three days of hearing, the Board heard the evidence of both the complainant and Mr. Johnson as well as several other witnesses. There were a number of significant conflicts between the evidence of the complainant and the evidence of Mr. Johnson, neither of whom were in the opinion of the Board completely candid in their testimony. The facts set forth below reflect the Board's assessment of the evidence taken as a whole, including our assessment of the appropriate weight to be given to the testimony of the complainant and Mr. Johnson, having regard to the such factors as the consistency of their evidence, the firmness of their respective memories, their ability to resist the influence of interest to modify their recollections, their capacity to express their recollections clearly and their demeanour.

5. The respondent operates a number of trucks that provide pickup and delivery services in Toronto for Emery Air Freight Corporation (hereinafter referred to as "Emery"). The complainant commenced employment with the respondent in March of 1980 as a driver. Prior to that, he had been a driver for "Atlantis Transportation", which provided pickup and delivery services for Emery until it (Atlantis) entered into a "management agreement" with the respondent, which had offered to purchase from Atlantis trucks and part of its contract with Emery. The purchase was completed in October of 1980.

6. The items which the respondent transports consist of "freight" and "express". Next day delivery is guaranteed for express, which is shipped "one piece per bill". Freight generally involves shipment of heavier cartons. Pursuant to its contract, the respondent charges Emery \$5.40 for transportation of one unit of freight and \$3.00 for transportation of an express item. Thus, if an express item is erroneously charged as freight, there is an overcharge to Emery of \$2.40.

7. In June of 1980, the complainant, who had been employed as an hourly-rated driver, "moved up" to fill an opening as a "broker". Each broker is paid a percentage of the revenue which his pickups and deliveries generate for the respondent. Each broker is required to provide a truck and is responsible for most of the truck's operating expenses. The complainant agreed to purchase a truck from the respondent at a cost of \$8,500 which was to be paid through installments deducted from his earnings.

8. By decision dated June 11, 1980 in File No. 2467-79-R, another panel of the Board, on the basis of a pre-hearing representation vote in which the complainant was ineligible to vote, certified the Canadian Brotherhood of Railway, Transport and General Workers (the "Union") as the bargaining agent for the following unit:

"all dependent contractors (truck operators) who provide haulage service for the respondent in and out of the City of Mississauga."

The respondent also employed a number of "drivers" who were not included in the bargaining unit. Immediately following certification, the Union gave the respondent written notice of its desire to bargain with a view to making a collective agreement, pursuant to section 14 of the Act, and made several attempts to contact the President of the respondent but was unable to arrange a bargaining meeting.

9. Meanwhile, Mr. Johnson, who testified that he was required to have a written agreement with his brokers in order to obtain the "P.C.V." licences needed to operate the trucks, approached the brokers directly and presented a "broker agreement" to each of them for their consideration. An appendix was added to each of the agreements by a lawyer (Mr. Shaw) whom the complainant and the other brokers consulted before signing them on October 8, 1980. Mr. Johnson testified that he "assumed that the brokers would take the broker agreements to the Union but instead they took it to a lawyer". However, he also testified that he "didn't think that there was anything funny about the brokers taking it to a lawyer instead of to the Union". Having regard to that inconsistency in his testimony and his demeanour while testifying concerning these matters, the Board does not find that evidence to be credible. Having regard to all of the circumstances, we find that Mr. Johnson intentionally circumvented the Union's bargaining rights by dealing with the brokers directly rather than through their certified bargaining agent, and by signing individual contracts with them rather

than bargaining in good faith with the Union and making every reasonable effort to make a collective agreement, as required by section 15 of the Act.

10. The broker agreements detail the relationship between the brokers and the respondent and include provisions concerning licences, insurance, vehicles and remuneration. When the complainant signed a broker agreement with the respondent, he was unaware that the Union had been certified as bargaining agent for the brokers. It was only through a subsequent "chat" with the dispatcher, his immediate superior, that the complainant, who was "feeling a little insecure with the way things were going", became aware of the Union's bargaining rights.

11. The Union appears to have acquiesced to some extent in the respondent's disregard for its bargaining rights. Rick Beckwith, who has been a representative of the Union for the past 11 years, testified that the brokers "seemed to be satisfied with [the broker agreements]". He also agreed during cross-examination that the brokers "obviously did not want [his] assistance in negotiating with the Company for the first agreement".

12. In late August or early September of 1980, Emery became aware that it had been overcharged by the respondent as a result of some "express" items having been "manifested" and billed as "freight". Gregory Richard, District Service Manager for Emery (who was called as a witness by counsel for the complainant), testified that Emery informed the respondent in October of many discrepancies which had been discovered by Emery's auditor. In November, Emery began to deduct the overcharges from monies owing to the respondent pursuant to their contract. As a result of meetings with Emery in October and November, the respondent agreed to revise its procedures to prevent any recurrence of overcharging. It was also decided "that the main party involved was the [the respondent's] dispatcher", who was, accordingly, discharged near the end of November. Emery, which employed a part-time auditor to review the pertinent records and determine the amount of overcharging, continued to search back into its records to uncover further overcharges. (As of July 1981, the auditor had "gone back" to July of 1980, and had discovered approximately \$3,000 in overcharges. Mr. Richard testified that the audit would continue until the cost of the audit began to exceed the funds being recovered thereby.)

13. That the complainant was a valued employee whose services were important to the respondent's operations is vividly demonstrated by the fact that the respondent took no disciplinary action against him when it was discovered in early November that his driver's licence had been suspended as a result of an unsatisfied judgment, even though the respondent's insurance coverage had been placed in jeopardy by the complainant's driving without a valid licence. It is also significant to note that this incident occurred before the time that the complainant engaged in any activities in support of the Union.

14. In late November or early December the complainant contacted Mr. Beckwith and told him that the brokers wanted the Union to negotiate a collective agreement for them because the broker agreements "weren't working and were concerned about job security. At the request of Mr. Beckwith, the complainant arranged for Mr. Beckwith to meet with the other brokers "about a week and a half later". Having been assured of the brokers' support, Mr. Beckwith undertook to contact the respondent. A further meeting was also scheduled with a view to "getting all drivers involved — hourly as well as broker".

15. On December 31, 1980, Mr. Johnson told the complainant that he had decided to

dismiss him. The complainant testified that the reason given by Mr. Johnson was "missed calls and refusals to make pickups" which Mr. Johnson allegedly refused to particularize. It was also the complainant's evidence that Mr. Johnson told him that he had heard that the complainant was the "instigator with the Union" and that there was "no way that a Union was coming in".

16. Mr. Johnson's evidence concerning that conversation was radically different from that of the complainant. It was his evidence that he had received complaints from Mr. Richard that the complainant had threatened some of Emery's "warehouse people" and engaged in "fisticuffs" with one of the employees of the warehouse. (Although Mr. Richard testified in the proceedings, counsel for the respondent did not question him at all with respect to the alleged threats or the alleged "fisticuffs".) Mr. Johnson also testified that the complainant said that "he had got a little carried away" and that "it wouldn't happen again" so he (Mr. Johnson) "backed off". Although he denied saying anything at the time about "keeping any union out", he did not deny that he told the complainant that he would have to obtain a "company name" to which cheques would be made payable, nor did he suggest in his evidence any *bona fide* justification for that request. He conceded that at that time he had received a letter from the Union asking when the respondent would meet with the Union, and that he "wanted to find out what the hell was going on" as he was "getting fed up with dealing with lawyers and back and forth".

17. Whichever version is the more accurate of the two, it is clear from the evidence as a whole that Mr. Johnson told the complainant on December 31, 1980 that he could only continue working for the respondent if he "solved the problem" by obtaining a "company name" to which remuneration for the complainant's services could be made payable. The Board also finds, having regard to all of the evidence, that the "problem" which Mr. Johnson hoped to solve by avoiding direct payments to the complainant was the prospect of collective bargaining with the Union, which he feared might give rise to the necessity of giving his hourly rated drivers a substantial wage increase. If the problem was, as stated by Mr. Johnson in his evidence, pugnacious conduct by the complainant, it is difficult to see how the interposition of a "company name" would in any way be responsive to such problem.

18. In January of 1981, the complainant began to receive cheques in a company name ("B & L Trucking") and opened a business account to enable him to cash the cheques. The complainant, who found this to be rather inconvenient, retained Brian Iler in early January to act as his lawyer concerning that matter. He also requested Mr. Iler to determine how much he owed on the truck that he was purchasing from the respondent. Since the complainant "wasn't entirely happy with the quality of representation he was receiving" from the Union, Mr. Iler had some discussions with Mr. Beckwith and ultimately telephoned Mr. Johnson on February 24th. During that conversation, Mr. Johnson, who admitted that he was very "hostile" to Mr. Iler, indicated that he wanted to make payments "to businesses rather than to individuals" as it was his understanding that if payment was made in this fashion, then the brokers "couldn't have a union". Mr. Johnson also told Mr. Iler: "I'm having problems with the Union. I made [the employees in the bargaining unit] brokers so they could make more money on the understanding that we wouldn't have any more problems with the Union . . . I am paying quite a premium to them to have them as brokers to keep the Union out. I have drivers as well (as brokers) and I am concerned that if they join the Union their rate would increase from \$6.50 to \$8.00 If the brokers do go with the Union, I will terminate them as brokers." (At that time, the drivers earned only about \$320.00 per week, while each broker's weekly take home pay was

between \$500 and \$1,100.) Mr. Johnson also described the brokers as “super workers” but expressed concern that they might have been receiving money to which they were not entitled since the dispatcher had been “taking money under the table”. He also spoke of the vulnerability of the respondent’s contract with Emery and the stigma which had attached to the respondent as a result of the “thefts”. Although Mr. Johnson testified during examination in chief that he could not remember having made some of the statements attributed to him by Mr. Iler, he conceded in cross-examination that he was “Very hot at the time” and “could have said a lot of things and not meant them in the heat of the moment.”

19. The brokers met with Mr. Beckwith who advised them that since his contacts with the respondent had not resulted in collective bargaining, it would be necessary to apply for conciliation. Mr. Beckwith also met with the respondent’s drivers and persuaded some of them to sign membership cards.

20. At a meeting convened by the conciliation officer, the Union was asked by the conciliation officer to submit its proposals to the respondent within a week. The brokers then met to discuss their collective agreement proposals and prepared a list of about twenty-five points which they gave to Mr. Beckwith, who forwarded them to the respondent and to the conciliation officer. The Union then contacted the respondent and a meeting was scheduled for March 16, 1981.

21. On February 23, 1981, the applicant filed an application for certification as bargaining agent for a unit comprised of “all employees (drivers) of the respondent working at or out of the City of Mississauga, Ontario, save and except supervisors, persons above the rank of supervisor, dispatchers, office and sales staff, and dependent contractors.” That application (File No. 2555-80-R) was heard on March 13, 1981 by another panel of the Board, which by decision dated March 13, 1981, issued to the applicant a certificate for that bargaining unit. No one appeared on behalf of the respondent at the hearing of that application.

22. It was Mr. Johnson’s evidence that he decided (at an unspecified point in time) that the Emery problem would not be solved as long as the respondent had people in its employ who had been involved in the overcharging. He testified that he “began going through evidence of which employees were involved so [he] could terminate the employees who were involved” and that he “discovered that the only people involved were the dispatcher and the four brokers”. On the basis of the totality of the evidence adduced in these proceedings with respect to the overcharging, the Board is unable to discern any rational basis for Mr. Johnson’s professed conclusion that the brokers were “involved”. Although Mr. Johnson testified that he had “tons of supporting documents”, only a few rather inconclusive documents were submitted in evidence before the Board.

23. On Thursday March 12th, management told the brokers that their pay cheques were in Buffalo with one of Mr. Johnson’s partners, Mr. Deblassy, and that they would not get them unless they “met with the Company”. The brokers then telephoned Mr. Beckwith who later called back and told them that he had spoken with management and arranged for their cheques to be at the respondent’s office by 2:00 p.m. on Friday, March 13th. Mr. Beckwith advised them to merely pick up their cheques and not to agree to meet with management. He also told the brokers that if the respondent wanted to meet with them, they could do that at the meeting already scheduled for Monday March 16th, and that “as far as [he] was concerned, no meeting should be held with the brokers unless [he] was there”.

24. When the cheques were not available by 2:00 p.m. on March 13th, the brokers were told that they "would be there [at the respondent's office located on Emery's premises] by 6:00 p.m.". At 5:45 p.m., Jim Ridout, another of Mr. Johnson's partners, called the employees and told them that since Emery did not want a meeting on its premises, if they wanted their cheques they would have to get them at Major Plastics. The brokers, who normally received their pay cheques each Thursday afternoon, "decided to leave their cheques and go home".

25. It was Mr. Johnson's evidence that management wanted to meet with the brokers to discuss the Emery overcharging problem and to find ways of resolving it. He also testified: "When they refused [to meet with management], we had no alternative but to fire them, so we terminated all four of them." It was also his evidence (in cross-examination) that it was his partner, Mr. Deblassy, who was "calling the meetings to discuss the situation before it got out of hand". Mr. Deblassy did not testify in these proceedings.

26. The complainant was subsequent notified by the following telegram that his employment was terminated:

"Effective the 13th day of March 1981 your employment with Sonic Transport Systems Ltd. will be terminated. Emery has found during a recent audit that gross over charging has occurred on all drayhe [sic] handled by Sonic Brokers. This discovery has severely jeopardized Sonic's relationship and it's [sic] contract with Emery. So far Sonic had made large monitary [sic] reparations to Emery, that they are still searching their records and it seems there is still great deals of money owing. [sic] Any monies now owed by Sonic to you, are being held in and applied against this over charge, also any outstanding bills that have been incurred to you by Sonic. Should it be the case that there is still monies owing [sic] over and above what has been held, our solicitor Robert Murray (964-3687) will notify you.

H Johnson President"

Each of the other brokers received a similar notice of discharge.

27. Prior to receiving that telegram, the complainant had not received any complaint about overcharging, although he and the other employees had been informed at a meeting with management that Emery was conducting an audit of its books. According to Mr. Johnson, that meeting was held by the respondent in February to "clear the air" by telling the employees why the dispatcher had been discharged (in November).

28. If management's true desire on March 13, 1981 was to find ways of rectifying the Emery overcharging problem, it is difficult to understand why they did not wait to raise the matter at the bargaining session scheduled for March 16, 1981, rather than abruptly discharging all of the persons in the bargaining unit three days before bargaining was scheduled to begin in earnest. It appears to the Board that this precipitous action on the part of the respondent was taken to punish the employees not for any part which they may have played in the Emery overcharging, but rather for refusing to meet with the respondent in the absence of their Union representative concerning a matter which would be of legitimate concern to that representative, and in retribution for their support of the Union. Further

support for that finding is provided by the fact that the overcharging practices were stopped in October when the respondent implemented safeguards “so it wouldn’t happen again”. Mr. Johnson, who himself admitted that he found out “in January that the brokers were responsible for the overcharging”, attempted to explain the “delay in firing them” as follows: “I couldn’t terminate one-third of the people we had without hurting us and the contract with Emery. I had to find people to replace them. I had to get competent people to do it.” However, he gave no indication of what steps, if any, he took to find competent replacements and he conceded in cross-examination that he had not “lined up” four such replacements as of March 13, 1981. Moreover, there is an element of inconsistency between his testimony that, on the one hand, he was looking for replacements in order to be in a position to terminate the brokers and, on the other hand, was sincerely desirous of meeting with the brokers to “find a solution” to the Emery problem.

29. Prior to the scheduled bargaining session on March 16, 1981, Mr. Johnson contacted Mr. Beckwith and said that in view of the fact that the respondent had discharged all of the brokers, he saw no reason for any meeting. Accordingly, the meeting was cancelled.

30. Following his discharge, the complainant went to Mr. Iler’s office and told him that the respondent “had his truck”. After reviewing the pertinent documentation and the complainant’s understanding of the (oral) arrangement between himself and the respondent with respect to the purchase of the truck, Mr. Iler advised him that, in his opinion, the truck belonged to him but there was some risk that he might not be found to be the owner as the truck was registered in the name of the respondent and he still owed the respondent part of the purchase price of the vehicle. Nevertheless, he told the complainant: “If you’ve got a key, it’s your truck — take it.” The complainant (who testified under the protection of section 5 of the *Canada Evidence Act*) went to the respondent’s office on Saturday March 20th and, without the consent or knowledge of the respondent, removed the key for the truck from the desk drawer in which it was normally kept. That the complainant had some concern about the propriety of his actions with respect to the truck is evident from the fact that rather than parking it at his house in Barrie, the complainant “put it at a friend’s house in Waverly, Ontario, north of Barrie”. The Board cannot give any credence to the complainant’s testimony that he parked the vehicle in Waverly because of a concern that “kids in his driveway [might] do it damage”.

31. The Union filed a section 89 complaint on behalf of the four discharged brokers, including Donald Lawrence (Board File No. 2754-80-U). With the assistance of two Labour Relations Officers, a settlement was reached on April 10, 1981, by which the three other brokers accepted reinstatement on April 20, 1981 without compensation. An offer of reinstatement without compensation was also made to the complainant but he chose not to avail himself of the offer on the advice of Mr. Iler. Accordingly, the written settlement of the complainant File No. 2754-80-U covered only the other three brokers; Mr. Lawrence was excluded on the understanding that he would be at liberty to file another section 89 complaint with respect to his discharge.

32. It appears that the reasons that the complainant did not accept the respondent’s offer of reinstatement was that management advised him through the Labour Relations Officer that if he returned to work with the truck the respondent would summon the police to arrest him and would discharged him for “theft” of the truck. Although the respondent informed the Ontario Provincial Police and the Royal Canadian Mounted Police that the

truck had been "stolen" and that they "had a feeling that it was taken by Donald Lawrence", the truck was not located for about two months. Thus, the respondent was forced to expend a substantial sum of money to rent a replacement for the missing vehicle.

33. It is not within the jurisdiction of this Board to determine whether the complainant acted illegally in removing the truck from the respondent's premises; that is a matter which can only be determined by the courts in criminal or civil proceedings. Accordingly, we expressly refrain from making any comment with respect to the propriety or impropriety of the complainant's dealings with the truck, which, it must be noted, occurred after he was discharged and, thus, could not have formed any part of the reasons for his discharge, which is the crucial issue of fact in this case.

34. During his testimony on July 21, 1981, Mr. Johnson told the Board that the respondent and the Union had succeeded in negotiating a collective agreement concerning all of the respondent's drivers, including those drivers who were formerly brokers. (Mr. Johnson testified that "there's no more brokers" because the respondent "couldn't take a chance on it at present". It was also his evidence that the three former brokers who were reinstated requested to be "put back as drivers" to avoid "the hassle concerning all the other allegations".) In an obvious effort to satisfy the Board that none of his actions were prompted by anti-union considerations, Mr. Johnson testified that there have been "no problems between [himself] and Mr. Beckwith", that he was "happy to deal with Mr. Beckwith" and that Mr. Beckwith "has been a great help". (Mr. Beckwith also testified that a satisfactory relationship has developed.) Although the Board does not doubt that the relationship between the respondent and the Union has matured so as to become mutually satisfactory to Mr. Johnson and Mr. Beckwith, the evidence clearly indicates that at the time of the discharge of the complainant, Mr. Johnson did not expect that to be the case. To the contrary, the evidence and the inferences which may legitimately be drawn therefrom clearly indicate that Mr. Johnson was at all material times very concerned that collective bargaining with respect to the brokers would have a detrimental effect upon the respondent's operations, particularly because of the adverse spillover effect which he anticipated it would have on the respondent's drivers. It was only as a result of his experience with the Union during settlement discussions with respect to the Union's section 89 complaint (in File No. 2754-80-U) that Mr. Johnson "got the impression that the Union was a hell of a lot easier to deal with" than he had expected it to be.

35. Having regard to all of the evidence, we are unable to accept the contention of counsel for the respondent that while there may have been "anti-union frustration" in this case, there was no "anti-union animus". We are of the view that the complainant's union activities which, to the obvious dismay of Mr. Johnson, led to a resurgence in the dependent contractors' interest in collective bargaining, and which also led to the certification of the respondent's drivers, was at least one of the reasons, if not the only reason, for his discharge. We are confirmed in this view by the pattern of anti-union conduct which is evident in this case, including Mr. Johnson's initial unwillingness to meet with the Union; his circumvention of the Union's bargaining rights by dealing directly with the brokers and entering into individual broker agreements; and his decision on December 31, 1980 to discharge the complainant, who had renewed the Union's interest in the bargaining unit and had facilitated Mr. Beckwith's contacts with the unorganized drivers, which decision was reversed only after the complainant undertook to obtain a "company name" to which cheques could be made payable. The blatantly anti-union statements which Mr. Johnson made to Mr. Iler only two and one half weeks before the mass discharge of all of the employees in the (dependent

contractors) bargaining unit on March 13, 1981, the date of hearing of the Union's application for certification with respect to the respondent's drivers, which mass discharge occurred only three days before collective bargaining was to begin in earnest with respect to that bargaining unit, also support that finding. For the foregoing reasons, the Board finds that the discharge of the complainant was tainted by anti-union motivation and was, therefore, in contravention of section 66 of the Act.

36. Counsel for the respondent argued, at the commencement of the hearing of this matter, that the Board should dismiss the complaint because of undue delay by the complainant in filing it. In an oral ruling the Board stated that the alleged delay was a matter which could be dealt with in determining the quantum of compensation, if any, to be awarded to the complainant, and that it was not so excessive as to prompt the Board to decline to hear the complaint in the exercise of its discretion under section 89 of the Act.

37. After the complainant became aware on April 10, 1981 that he was not going to obtain what he considered to be appropriate redress through the Union's complaint (in File No. 2754-80-U), he attempted to meet with Mr. Iler but it took some time for them to get together. When he ultimately did meet with Mr. Iler, he instructed him to file a section 89 complaint with the Board. As a result, this complaint was filed on May 19, 1981. Mr. Iler explained that the complaint "didn't get out as soon as [he] would have liked" because his office was "backlogged".

38. Undue delay on the part of a party's solicitor or agent will generally be attributed by the Board to the party. However, the Board recognizes that consultation with counsel, investigation by counsel and preparation of a complaint do require a reasonable period of time. See, for example, *Decor Wood Specialties*, [1974] OLRB Rep. Mar. 137, at paragraph 138, in which the Board stated:

"... In such circumstances where delay can be attributed to one party to a Board proceeding, it seems obvious to us that the other party should not be prejudiced. The Board does not pretend to set a fixed guideline with respect to what is a reasonable time for an aggrieved to initiate proceedings after an alleged violation of the Act. For example, it is the Board's opinion that a complaint should not be launched frivolously and without consideration of a reasonable chance for success. Of course, this assurance can only be obtained by examining the evidence, by interviewing witnesses, and by generally grasping a feeling for the case to be met. This may take some time."

In that case, the Board found that a five week delay in filing a discharge complaint was not justified, and denied the complainant compensation for three of those five weeks since it was of the view that two weeks from the date of the discharge should have been sufficient time to file the complaint. (See also *Ernie's Signs Limited*, [1976] OLRB Rep. Aug. 404.)

39. Having regard to all of the circumstances in the instant case, the Board is of the view that if the complainant and his counsel had proceeded with due diligence, this complaint would have been filed on or before April 30, 1981. Accordingly, no compensation will be awarded for the period from May 1, 1981 to May 19, 1981, inclusive.

40. Where the Board finds that a party has committed an unfair labour practice, the Board will generally direct that party to post a notice for 60 days in conspicuous locations in the work place, to attempt to remedy the adverse psychological impact of the contravention of the Act (see *Valdi Inc.*, [1980] OLRB Rep. Aug. 1254). However, as noted above, it is clear from the evidence that following a rather rocky beginning, the relationship between the respondent and the union has matured so as to become mutually satisfactory, and has yielded a collective agreement. Since we are concerned that in the circumstances of this case, in which three of the four original grievors accepted reinstatement without compensation for lost earnings, the posting of a notice could adversely affect that relationship, we are of the view that this is not an appropriate case in which to direct the respondent to post a notice.

41. The Board therefore orders:

- (i) that the complainant be reinstated by the respondent forthwith, and that the complainant be given the choice of working as a “broker” or as a “driver”, to parallel the options that were offered to the other three “brokers” who have been reinstated by the respondent;
- (ii) that the complainant be fully compensated by the respondent for all lost wages and benefits sustained through the respondent’s violation of the Act, with the exception of any lost wages and benefits sustained from May 1, 1981, to May 19, 1981, inclusive; and
- (iii) that the respondent pay interest on the compensation for lost wages ordered by the Board, such interest to be calculated in the manner described in Practice Note. 13 dated September 8, 1980.

42. The Board remains seized of this matter in the event that a dispute arises concerning the implementation of the Board’s order.

0594-81-R United Brotherhood of Carpenters and Joiners of America, Local Union No. 446, Applicant, v. **Subito Contracting (Drywall & Painting Co. Limited)**; CM and Superior Drywall and Painting Co. Inc.; and Pioneer Contracting (Drywall & Painting) Inc., Respondents.

Related Employer – Sale of a Business – Different corporate entities operated by two family members – One doing ICI work and other residential – Whether related – Whether two businesses carried on at different points in time related – Whether union delay causing Board not to exercise discretion to declare

BEFORE: Ian Springate, Vice-Chairman, and Board Members C. A. Ballentine and J. A. Ronson.

APPEARANCES: Douglas J. Wray and Matti Rissanen for the applicant; Donald B. Laidlaw, Phyllis Checchin and Carlo Checchin for the respondents.

DECISION OF THE BOARD; October 19, 1981

1. This is an application under section 1(4) of the *Labour Relations Act* in which the applicant has requested that the Board treat the three respondents as constituting a single employer for the purposes of the Act or, in the alternative, declare that there has been a sale of a business within the meaning of section 63 of the Act to Pioneer Contracting (Drywall & Painting) Inc. from either or both of the other two respondents.

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3. These proceedings concern three individuals and the various businesses under their control. Mr. Carlo Checchin and Mr. Giuliano Checchin are brothers. Giuliano Checchin is married to Phyllis Checchin. For ease of reference these three individuals will be referred to simply as Carlo, Giuliano and Phyllis. Also for ease of reference, the three respondents will be referred to simply as "Subito", "CM" and "Pioneer", and the applicant as "Local 446".

4. Carlo was involved in the drywall installation and painting business for a number of years prior to the incorporation of any of the respondents. The evidence indicates that Carlo is a skilled worker, with a good deal of experience in supervising employees. Carlo appears to be particularly adept in estimating the cost of jobs and preparing bids. During 1973, Carlo and an individual identified only as Mr. Rizzo incorporated CM, with Carlo as its president, to do drywall installation and painting work in the Sault Ste. Marie area. Subsequently, Carlo acquired all of the company's shares. CM acquired a building located at 153 Great Northern Road in Sault Ste. Marie from which it continues to operate.

5. CM appears to be a relatively successful firm. The company's major jobs have all been commercial projects, although it has also done a certain amount of residential work. Local 446 acquired bargaining rights for carpenters employed by CM in the industrial, commercial and institutional sector of the construction industry during or about 1974. On July 23, 1980, this Board certified Local 446 as the bargaining agent for all carpenters and carpenters' apprentices employed by CM in all other sectors of the construction industry, including the residential sector.

6. Over the years CM acquired a number of assets in addition to its building. These included drywall tools, a truck and various types of office equipment. At one time the company employed a woman to work in the office. For a while, when this woman was off work due to illness, Carlo's sister-in-law, Phyllis, came in on a part-time basis to help out. At some point in time, just when, it is not clear, Phyllis was made the company's corporate secretary. Apparently this was done to assist Carlo, who testified that he does not write fluent English. Phyllis was not paid for the relatively minor duties she performed as corporate secretary.

7. In 1975 Carlo and his brother Giuliano incorporated the Subito firm. Giuliano was experienced in the installation of drywall, but apparently had no previous managerial experience. Carlo and Giuliano each contributed \$2,000.00 to provide Subito with operating capital and to allow it to purchase equipment, including tools and a truck. Notwithstanding that each contributed an equal amount to the firm, Giuliano received fifty-five per cent of the company's shares while Carlo received forty-five per cent. Giuliano was named president of the firm and he was responsible for its day to day operations. The field staff of Subito was overseen by Giuliano, who acted as a working foreman. Carlo did the firm's estimating work. Subito operated out of 153 Great Northern Road, and paid rent to CM. The firm engaged exclusively in residential drywall installation and painting.

8. After Subito was established, a Mrs. Eseda Diotallevi was hired to do the office and paperwork for both Subito and CM. Mrs. Diotallevi was actually employed by Subito, but half of her wage cost was charged back to CM. Phyllis appears not to have done any work for Subito, although she continued to be the unpaid corporate secretary for CM.

9. On June 14, 1978, Local 446 was certified as the bargaining agent for carpenters and carpenters' apprentices in the employ of Subito. On June 19, 1978, the union sent the company notice to bargain for a collective agreement, and on August 21, 1978 the parties met with a conciliation officer, but without reaching any agreement. On September 18, 1978, the Minister of Labour released a "no-board" report, which meant that as of October 5, 1978, the union was in a legal position to strike. On November 19, 1978, the parties again met, and this time reached an understanding. On the basis of this understanding, Giuliano, on behalf of Subito, sent a letter to Local 446 agreeing to abide by the terms and conditions of "the last collective agreement in the housing sector". This was a reference to a standard form residential agreement which a number of Sault Ste. Marie contractors had entered into with Local 446. At the hearing, counsel for Local 446 stated that at the present time the union is not party to any residential agreements and accordingly takes the position that Subito is no longer bound to the terms of any collective agreement in the residential sector.

10. On November 19, 1978, the same day that Giuliano agreed to be bound by the residential agreement, Matti Rissanen, the business agent of Local 446, forwarded a letter to Giuliano stating that the union would not interfere with the wages and benefits being paid by Subito to its employees for the duration of the project which was then being constructed by Subito. The project in question was completed by Christmas of 1978. According to Giuliano's testimony, Subito then found itself unable to successfully bid on any jobs due to the wage rates in the collective agreement. Quite apart from this problem, however, Subito had acquired debts of some ten or twelve thousand dollars, and its creditors were pressing for the money. In the result, it was decided that rather than have the firm go bankrupt, with the attendant adverse effect on the reputations of both Giuliano and Carlo, Carlo would cover all of Subito's debts and in return acquire ownership of Giuliano's shares in the company. This transaction was completed sometime during December of 1978.

11. When giving his testimony, Carlo made it clear that he had paid the ten or twelve thousand dollars in exchange for Giuliano's shares not because he desired to gain control of Subito, but only to head off Subito's bankruptcy and thereby protect the reputation of himself and his brother. Once Carlo gained total control of the firm, it ceased operations entirely, although it still exists as a legal corporate entity. Subsequent to December of 1978, Giuliano acquired and performed a few small residential jobs in his personal name.

12. Pioneer was incorporated on February 16, 1979, with Phyllis as its sole shareholder and director. Phyllis was no stranger to the construction industry. When younger she helped her father build homes, and indeed she continued to do so while attending university. Phyllis testified that she had Pioneer incorporated because she wanted to try her hand at running a company. Phyllis borrowed five thousand dollars from the bank to get Pioneer underway. Arrangements were then made with Carlo to transfer the van and office equipment which had been used by Subito over to Pioneer. In return, Pioneer repaid one of Subito's debts to the sum of two thousand dollars, and also paid about one thousand six hundred dollars to the Workmen's Compensation Board to cover the amount still owed by Subito to the Board.

13. Pioneer leases an office from CM at 153 Great Northern Road for seventy dollars per month. This sum includes a payment for the use of CM's office equipment. Subsequent to Pioneer's commencing business, all new equipment used at 153 Great Northern Road has been purchased in the name of CM, and it appears that the only office furniture or equipment owned by Pioneer which is still in use is a single filing cabinet. The van which Pioneer obtained from Subito is no longer in use, but has been replaced by a new van now rented by Pioneer. Pioneer owns no equipment of its own, but rather rents drywall equipment from CM for a flat rate of one hundred dollars per month.

14. Phyllis works in the office at 153 Great Northern Road three days a week, but does not work in the field. Although paid by Pioneer, Phyllis does the payroll and invoicing for both Pioneer and CM. Mrs. Diotallevi, who previously worked for Subito, now works as an employee of Pioneer four days a week doing office work on behalf of both Pioneer and CM. CM pays Pioneer six hundred dollars per month for the services of both Phyllis and Mrs. Diotallevi.

15. When Pioneer commenced its operations, Carlo did all of its estimating work, for which he was not paid. In March of 1980, Pioneer hired its own estimator, who works only for Pioneer. On occasion, Carlo has checked the bids prepared by Pioneer's estimator, but by and large he has ceased any active involvement with the company.

16. Pioneer did its first job in May of 1979. To date it has done only residential work, primarily single family homes. It appears that most of Pioneer's jobs have been of very short duration, perhaps two weeks each, and that depending on the work flow, company employees would have been on some job sites for only a couple of hours at a time. Pioneer did not put up company signs at any of the job sites it was involved with, and both its original and new rented vans did not bear the company's name. Mr. Rissanen, the business agent of Local 446, testified that he first heard of Pioneer in September of 1979 when other unionized contractors began to complain about the firm. According to Mr. Rissanen he understood that the Checchin brothers had some involvement with Pioneer and accordingly he approached Carlo when he was on a CM job, and asked him about the firm. According to Mr. Rissanen, Carlo told him that he had no knowledge of Pioneer. Carlo, when giving his testimony, put this conversation

sometime in June or July of 1979. According to Carlo, Mr. Rissanen said he felt that either Carlo or his brother Giuliano were involved with Pioneer, to which Carlo replied that it was up to Mr. Rissanen to find out.

17. Mr. Rissanen testified that the first time he actually came across Pioneer was shortly prior to the filing of this application when he met Giuliano on a large apartment and townhouse development in Sault Ste. Marie, and that this meeting prompted the filing of the instant application. It is undisputed that the job in question was the largest one that Pioneer had been involved with up to that time.

18. It is against this background that Local 446 seeks to have the Board find that either sections 1(4) or 63 of the Act are applicable. What Local 446 is in fact seeking is to have its bargaining rights for employees of either CM or Subito also apply to employees of Pioneer. Section 1(4) and the relevant portions of section 63 provide as follows:

1(4) Where, in the opinion of the Board, associated or related activities or businesses are carried on, whether or not simultaneously, by or through more than one corporation, individual, firm, syndicate or association or any combination thereof, under common control or direction, the Board may, upon the application of any person, trade union or council of trade unions concerned, treat the corporations, individuals, firms, syndicates or associations or any combination thereof as constituting one employer for the purposes of this Act and grant such relief, by way of declaration or otherwise, as it may deem appropriate.

63(1) In this section,

- (a) "business" includes a part or parts thereof;
- (b) "sells" includes leases, transfers and any other manner of disposition, and "sold" and "sale" have corresponding meanings.

(2) Where an employer who is bound by or is a party to a collective agreement with a trade union or council of trade unions sells his business, the person to whom the business has been sold is, until the Board otherwise declares, bound by the collective agreement as if he had been a party thereto and, where an employer sells his business while an application for certification or termination of bargaining rights to which he is a party is before the Board, the person to whom the business has been sold is, until the Board otherwise declares, the employer for the purposes of the application as if he were named as the employer in the application.

(3) Where an employer on behalf of whose employees a trade union or council of trade unions, as the case may be, has been certified as bargaining agent or has given or is entitled to give notice under section 14 or 53, sells his business, the trade union, or council of trade unions continues, until the Board otherwise declares, to be the bargaining agent for the employees of the person to whom the business was sold in the like

bargaining unit in that business, and the trade union or council of trade unions is entitled to give to the person to whom the business was sold a written notice of its desire to bargain with a view to making a collective agreement or the renewal, with or without modifications, of the agreement then in operation and such notice has the same effect as a notice under section 14 or 53, as the case requires.

19. In dealing with this matter, we turn first to consider the relationship between CM and Pioneer. We are satisfied that there has not been a transfer of any assets or operations from CM to Pioneer, and that accordingly section 63 has no application. With respect to a possible application of section 1(4), it is to be noted that the ownership of the two firms is different. CM is owned solely by Carlo, whereas Pioneer is owned solely by Phyllis. Although as the Board indicated in *United Shelters Ltd.* [1981] OLRB Rep. June, 796 when different corporate entities owned and operated by principals with close family ties co-operate closely with each other, a section 1(4) declaration may well be appropriate, we do not believe such to be the case with respect to CM and Pioneer. At the time of the filing of this application, Carlo had ceased doing the estimating work for Pioneer. Further, and more importantly, it is clear that in the past Local 446 accepted the existence of two separate companies owned by the Checchins, one, CM primarily engaged in commercial work and another, Subito, exclusively engaged in the residential field. CM and Subito operated side by side with integrated office and administrative operations, and, indeed, the relationship between CM and Subito raised all of the issues of common direction and control now present in the relationship between CM and Pioneer. Local 446 did not, however, seek to have the Board declare CM and Subito to be a common employer. Indeed, to the contrary the union acquired bargaining rights separately for the two companies and also treated them as separate entities for collective bargaining purposes. In these circumstances, we feel the status quo of CM being treated as a separate employer for the purposes of the Act should be maintained. Accordingly, even if we were to assume that the statutory requirements for making a section 1(4) declaration were present in this case, we would, nevertheless, decline to exercise our discretion to treat CM and Pioneer as a single employer for the purposes of the Act.

20. This, then, brings us to the relationship between Subito and Pioneer, two corporations which have carried on business at different points in time. The Board addressed itself to this type of situation in the *Brant Erecting and Hoisting* case, [1980] OLRB Rep. July 945 as follows:

13. Section 1(4) does not require that related business activities under common control or direction be carried on simultaneously or contemporaneously. This issue was clarified in 1975 by the addition to section 1(4) of the phrase "whether or not simultaneously". The amendment reflects a legislative recognition that the essential unity and identity of an economic activity (which gives rise to employment) may be preserved even though the legal vehicles through which the activity is carried on will not operate simultaneously; and, business may be effectively transferred from one corporate entity to another, without any of the indicia of a "transfer of a business" which might trigger the application of section 55. This is especially the case in the construction industry where many of the employers will not have the permanence or investment in fixed plant and equipment characteristic of a

manufacturing concern. A small construction company can move from jobsite to jobsite or place to place, assembling tools, equipment and a labour force as required after it has made a successful bid. There may be no established economic organization, labour force or configuration of assets. A single principal may have several companies which are used, more or less interchangeably, so that bidding is done and work performed through whichever company is convenient. In such circumstances there may be an effective transfer of business between related businesses without any apparent disposition of assets, inventory, trade names, goodwill, employees, etc. Similarly, where capital requirements are minimal and business relationships transitory, it is relatively easy to wind up one business, and create another one which carries on essentially the same business as before. Indeed there will often be good commercial reasons for doing so unrelated to any express desire to undermine the union's bargaining rights. The earlier company may have run into financial difficulties, or lost its reputation, or there may be legal, accounting or tax advantages in establishing a new vehicle through which the business, or related business activities can be conducted. Again, it is quite possible to do this without a clear and concrete disposition between the two firms so as to call section 55 into play. To ensure that the industrial relations status quo is preserved, the Legislature has provided that where two employers carry on related economic activities, under common control and direction, whether or not simultaneously, they can be treated as one for the purposes of the Act. However, it should be noted that section 1(4) is discretionary. The Board need not make a 1(4) declaration even when the conditions precedent are present; and has not done so, for example, where a trade union is seeking to *extend* rather than *preserve* its bargaining rights.

...

15. A more difficult question is whether Brant Erecting and Hoisting and Provincial Steel can be said to have engaged in "associated or related activities or businesses" since, for practical purposes, Brant Erecting ceased to exist as a going concern prior to the establishment and subsequent incorporation of Provincial Steel. The respondent contends that the two businesses cannot be "related" within the meaning of section 1(4) because they were never engaged in any joint ventures or business endeavours, nor were they carrying on business at the same time. The respondent argues that such overlap as there may have been between the activities of Provincial Steel and Brant Erecting, was solely for the purpose of winding up the latter company, and cannot be regarded as the kind of related activity to which section 1(4) is directed. But for the 1975 amendment to the Act, this argument would have considerable force; but it is now clear that the "associated or related activities or businesses" need not be carried on simultaneously. The amendment extends the ambit of section 1(4) to situations in which one business entity is actively carrying on business and the other is not. It is not necessary to have shared participation in a common business endeavour or even

contemporaneous economic activity. The relationship between the business entities is a functional rather than a temporal one. Businesses or activities are “related” or “associated” because they are of the same character, serve the same general market, employ the same mode and means of production, utilize similar employee skills, and are carried on for the benefit of related principals. If these criteria are met, two businesses may be “related” within the meaning of section 1(4) even though their activities are carried on through different corporate vehicles and are not carried on simultaneously. It is evident that the Legislature has created a regime of collective bargaining law which significantly modifies the common law notions of “privity of contract” or “the corporate veil”.

21. All of the shares of Subito are currently held by Carlo, but the firm has not carried on business subsequent to Carlo becoming its sole owner. When Subito was an operating entity, majority control was held by Giuliano, who also served as the firm’s president. All of the shares of Pioneer are now held by Phyllis, Giuliano’s wife, and Phyllis serves as its president. The affairs of both entities have presumably been carried on for the benefit of the Giuliano-Phyllis household. Pioneer started operations by acquiring certain of Subito’s assets and paying off certain of its debts. Subito and Pioneer have both carried on business as residential drywall and painting contractors in the Sault Ste. Marie area, working out of the same premises and utilizing similar employee skills. Giuliano continues to direct the field forces of Pioneer in exactly the same manner as he did the field forces of Subito. Taking these circumstances into account, we are satisfied that although Subito and Pioneer are unrelated in time, they are so identical in their essential makeup as to be considered associated or related businesses. We are further satisfied that they have been carried on under common direction and control. It follows, in our view, that all of the statutory preconditions for the application of section 1(4) have been met in this case.

22. The fact that all the statutory preconditions for a section 1(4) declaration have been met is not determinative of this matter. The Board still retains a discretion as to whether or not it should treat the two legal entities as a single employer. One of the purposes of section 1(4) is to protect a union’s existing bargaining rights. We are satisfied that the rights which Local 446 acquired with respect to the employees of Subito would be protected by Subito and Pioneer being treated as a single employer. Counsel for the respondents contended that the Board should decline to apply the section because of Local 446’s delay in filing the application. The Board has in a number of cases declined to apply section 1(4) in instances where a trade union had actual knowledge that a related company was undermining its bargaining rights, or was wilfully blind to this fact and, without cause, failed to seek a remedy under section 1(4) within a reasonable period of time. However, as the Board noted in *The Great Atlantic & Pacific Company of Canada Limited* case, [1981] OLRB Rep. March 285, the Board should not exercise its discretion to create an unreasonable high standard of due diligence. A union’s resources are not unlimited, and this limitation must be considered in assessing how quickly a union should become aware of, investigate and respond to, situations which might call for the application of section 1(4). Mr. Rissanen is responsible for overseeing Local 446’s affairs across all of the District of Algoma south of the 49th parallel of latitude. As early as 1979, Mr. Rissanen, on the basis of second hand information, made inquiries about the status of Pioneer to Carlo. Where one accepts Rissanen’s or Carlo’s account of that conversation, it is clear that Carlo did not advise Mr. Rissanen as to the true state of affairs. Mr. Rissanen testified that

until shortly prior to this application being filed, he did not come across Pioneer on any job site. This is entirely possible due to the short-term nature of most of Pioneer's work, as well as the fact that Pioneer did not advertise its presence on job sites or have the Pioneer name on its truck. It was only when Pioneer became engaged on a major apartment and townhouse project that Mr. Rissanen actually came across Giuliano heading up a crew of Pioneer employees. Shortly afterwards, this application was filed. In our view, it is not the case that Local 446 failed to seek a remedy under section 1(4) in the face of knowledge that its bargaining rights were being eroded away by a company related to Subito. Accordingly, we are of the view that the Board should exercise its discretion to apply section 1(4).

23. Having regard to the foregoing, the Board is satisfied that Subito and Pioneer should be treated as constituting a single employer for the purposes of the *Labour Relations Act*.

24. Local 446 was certified by this Board as the bargaining agent for all carpenters and carpenters' apprentices in that portion of the District of Algoma south of the 49th parallel of latitude, without reference to sector. Having regard to the province-wide bargaining provisions of the Act, the Board is satisfied, and so declares, that both Subito and Pioneer are bound by the current carpenters' provincial agreement insofar as the industrial, commercial and institutional sector is concerned. With respect to all remaining sectors, including the residential sector, the Board is satisfied, and so declares, that Local 446 holds bargaining rights for carpenters and carpenters' apprentices employed by both Subito and Pioneer, but that neither corporation is bound by the terms of a subsisting collective agreement.

0991-81-R Toronto Auto Parks (Airport) Limited, Applicant, v. Canadian Union of Public Employees, Respondent.

Certification – Reconsideration – Employer claiming going out of business as consequence of certification – Claiming employees unemployed and union having no employees to bargain for – Whether alleged adverse results of certificate causing Board to revoke certificate

BEFORE: M. G. Mitchnick, Vice-Chairman, and Board Members J. D. Bell and W. F. Rutherford.

APPEARANCES: Aaron Black and G. T. Bachelor for the applicant; Helen O'Regan for the respondent.

DECISION OF THE BOARD; October 14, 1981

1. This is an application for reconsideration, pursuant to the Board's powers under section 106(1) of the *Labour Relations Act*. That section provides:

The Board has exclusive jurisdiction to exercise the powers conferred upon it by or under this Act and to determine all questions of fact or law that arise in any matter before it, and the action or decision of the Board thereon is final and conclusive for all purposes, but nevertheless the

Board may at any time, if it considers it advisable to do so, reconsider any decision, order, direction, declaration or ruling made by it and vary or revoke any such decision, order, direction, declaration or ruling.

2. The decision which the applicant, Toronto Auto Parks (Airport) Limited, seeks to have reconsidered is the decision of July 31, 1978, in which the Board certified the Canadian Union of Public Employees ("CUPE") as bargaining agent for the employees of Toronto Auto Park operating the parking lots on behalf of the federal government at Malton Airport. Following that certification, the applicant and CUPE commenced bargaining with a view to entering into a collective agreement. In the meantime, however, the contract for operating the parking lots at Malton came up for re-tendering. The applicant indicates that as a result of having to include in its tender a contingency fee to cover at least the minimum increase in its costs which could be expected as a result of collective bargaining, it was precluded from bidding competitively, and the contract was awarded to someone else. The applicant points out that staffing services at the Airport are provided on the basis of a *fixed* management fee, and that control of the parking rates and revenues of the operations rest solely with the federal government.

3. The successful bidder on the Airport contract was in fact Metropolitan Parking Inc. That company, as a result of a random procedure of hiring, hired some but not all of the former employees of Toronto Auto Parks. The trade union, CUPE, applied to the Board under section 63 of the *Labour Relations Act* for a declaration that Metropolitan was the successor employer to Toronto Auto Parks, and that the union's bargaining rights continued (see *Metropolitan Parking Inc.*, [1979] OLRB Rep. Dec. 1193). The Board, after lengthy analysis, however, found that no transfer of a business had taken place between Toronto Auto Parks and Metropolitan Parking Inc., and dismissed the union's application. The Board did, it might be observed, find Metropolitan's method of hiring to be a violation of the Act, and ordered certain relief to employees of Toronto Auto Parks.

4. The applicant concedes that the trade union had the requisite majority support amongst the employees in the bargaining unit at the time of CUPE's initial certification, and that the Board had no choice but to certify. The applicant argues, however, that subsequent events, and in particular the Board's failure to grant successor rights to CUPE with respect to Metropolitan Parking Inc., have demonstrated the utter futility of the initial certification. The applicant points out that not only has the certification resulted in the applicant itself being out of business, but those of its employees not hired by Metropolitan are out of jobs as well, and CUPE has been left with no employees for whom to bargain. The applicant asks the question whether, had this outcome been foreseen earlier, the Board would have granted the certification, or whether either the employees or CUPE itself would have requested certification. The applicant, in conclusion, asks that it simply be allowed to carry on its business on the same basis as the other employers who compete for the parking contract at Malton Airport, i.e., all on a unionized basis, or all on a non-unionized basis. To accomplish this under the present circumstances, the Board is requested to revoke the certification granted to CUPE on July 31, 1978.

5. This is a situation in which the frustration now felt by the applicant employer must not be minimized. It must be recognized, however, that neither the employer nor the Board is in a position to speak for CUPE or the employees it was certified to represent. The possibility that collective bargaining may impact to a greater or lesser degree on the competitiveness or

even continued existence of the employer is a factor which both the employees and the trade union must always weigh. Having done so, however, their wishes must be determinative of the question of certification. The Board is wholly without jurisdiction, either before or after certification takes place, to take the factor of competitiveness into account. The *Labour Relations Act* prescribes the procedures for both the acquisition and the termination of bargaining rights, and the power entrusted to the Board to reconsider its own decisions cannot be taken as a mandate by the Legislature to substitute the Board's own discretion for the specific requirements of the Act. Indeed, it is difficult to envision the basis on which the Board would exercise such a discretion. In the present case, it is for CUPE to decide for itself whether it wishes to walk away from the situation, and CUPE has made it clear to the Board that it does not. Beyond that, the procedures for termination of bargaining rights continue to provide an outlet for the free wishes of the employees themselves, should any be re-employed by the applicant in the bargaining unit at some date in the future. The Board is fully aware of the reasons why no employees are employed in the bargaining unit at present. The fact remains, however, that no such employees do exist at present, and the Board is not entitled to speculate what their wishes might be if they did.

6. The Board must conclude that no valid grounds have been put forward by the applicant upon which the Board could or should reconsider its decision of July 31, 1978, and the application is dismissed.

0691-81-R The International Association of Machinists and Aerospace Workers, Applicant, v. **Treco Machine & Tool Ltd.**, Respondent.

Pre-Hearing Vote – Representation Vote – Employee breaching silent period – Whether causing Board to direct new vote – Board policy where silent period rule breached – Whether employer condoned breach

BEFORE: M. G. Mitchnick, Vice-Chairman, and Board Members W. H. Wightman and O. Hodges.

APPEARANCES: *M. Green and J. Holden for the applicant; G. Grossman and G. Alex for the respondent.*

DECISION OF M. G. MITCHNICK, VICE-CHAIRMAN; October 13, 1981

1. This is the continuation of an application for certification by way of pre-hearing vote. The vote took place as ordered by the Board on August 13, 1981. In accordance with the Board's usual practice, the Registrar directed a "silent period" to commence 72 hours before the day of the vote, or midnight of August 9th. The vote on the 13th was won by the applicant 64 to 54, but the respondent is now seeking to set aside the results of the vote, on the basis of violations of the Board's "silent period" by one of the applicant's supporters in the bargaining unit, a Mr. Egbert Thomas.

2. While there were certain conflicts in the evidence adduced before the Board by the two parties, the Board is prepared to assess the matter on the assumption (although without

finding) that everything contained in the evidence of the respondent is accurate. By way of background, it should be noted that the applicant's organizing campaign began in approximately January of 1981. Mr. Thomas at that time was a supporter of the applicant, and when asked to approach a couple of his friends to sign cards, did so. A review of the cards indicates that Mr. Thomas acted as collector on two cards, and none later than January 20th. The two chief employee organizers for the applicant, a Mr. Wall and a Mr. Wells, were laid off by the respondent on January 30th, and Joyce Holden, the applicant's staff person in charge of the campaign, testified that Mr. Thomas declined to assist the applicant further after that. In the week prior to August 10th, Mrs. Holden met with the employee organizing committee every night, and, as a part of those meetings, emphasized the importance of adhering to the "silent period" established by the Board. In this regard the Registrar's direction, which is posted to the attention of all employees, reads:

I direct all interested persons to refrain and desist from propaganda and electioneering from midnight of Sunday, August 9, 1981, until the vote is taken.

At one of these meetings, for example, an employee organizer asked if it was all right for employees to use during the "silent period" the pens which the applicant had distributed, and Mrs. Holden answered "no". Mr. Thomas, however, having ceased to play any formal role in the organizing campaign for so long, was not in attendance at these meetings, and was, like all other interested employees, simply to be cautioned by word-of-mouth.

3. The respondent called as its witnesses two employees in the bargaining unit, Mr. Everton Williams and Mr. Wilton Bizier. Mr. Williams testified that he has been with the company for two years, and works the afternoon shift. He is familiar with Mr. Thomas, and from time to time during the organizing campaign had engaged in discussions with him about the union. There was apparently a petition being circulated against the union at one point in the past, and Mr. Williams admitted saying to Mr. Thomas that if they didn't sign for the company, Gary Alex (the Plant Manager) would give them a hard time. Mr. Williams further conceded that he was concerned that if seen by management to support the union, his job would be in danger. There was also a section 89 complaint brought before the Board in which the Board found that Mr. Wall and Mr. Wells had been laid off for their union activity, and ordered reinstatement. Mr. Williams testified that he saw the Notice posted by the company (at the Board's direction) to that effect, and that "everybody was worrying; some wanted the union, but were afraid management could find out". The applicant has now filed a further section 89 complaint in this matter, as well as a section 8 application on which it intends to proceed should the Board find that the first vote was invalid.

4. Mr. Williams testified that on Monday, August 10th, (the first day of the "silent period"), he came to the cafeteria on his break and sat down in his usual place, a couple of tables away from Mr. Thomas. Mr. Thomas said: "There's a rumour going around if you don't vote for Treco you'll be fired". There was no further discussion. Later that evening, Mr. Williams' friend, Mr. Bizier, came to him and reported a "different" version of the rumour which *he* had heard from Mr. Thomas. That version, as explained to the Board by both Mr. Williams and Mr. Bizier, was to the effect that the company would know who hadn't signed the petition, so if you didn't sign the petition, you had better vote for the union to protect your job. Mr. Williams and Mr. Bizier testified that they thought nothing of the statements by Thomas, but agreed to keep it to themselves so as not to cause other employees any concern. Mr. Bizier

did, however, happen to be talking to his foreman during the next break, and mentioned Mr. Thomas' statements to him. The foreman was unimpressed as well.

5. It should be noted that the respondent does not rest its case on the ground that the impugned statements by Mr. Thomas were either intimidating or misleading. The respondent need not go that far. Rather, the respondent simply takes the position that the Registrar's direction regarding the "silent period" has been violated, and that a new vote ought to be ordered. In support of this result the respondent's argument is two-fold:

- (a) that Mr. Thomas was an individual affiliated with the applicant's organizing campaign and for whose conduct the applicant is accordingly responsible; or
- (b) that Mr. Thomas was in any event an "interested person" and one of the employees to whom the Registrar's prohibition was directed, and that a violation by such a person should in itself entitle the other employees to a fresh opportunity for a vote.

6. The Board finds that Mr. Thomas had not been formally involved in the applicant's organizing campaign for several months before the vote was conducted. He was, by the time of the vote, no longer a part of the group of employees with whom the applicant was having direct contact in the furtherance of its organizing efforts. The Board accordingly finds that Mr. Thomas by the time of the vote had ceased to be an employee for whose actions the applicant was directly responsible, and the first branch of the respondent's submission is dismissed.

7. It is the second branch of the respondent's argument that is the more perplexing, underscoring as it does the problems of control and enforcement which arise out of the imposition of the "silent period" by the Board. The purpose of the "silent period" has been reiterated in a long line of Board cases, the most recent being *Anderson Metal Industries Inc.*, [1981] OLRB Rep. April 415, at paragraph 9:

Its primary object is to ensure that, so far as possible, the vote will be conducted in an atmosphere of calm and that the employees who are to participate in the vote shall not be subjected to partisan pressures and influences as the voting day approaches. The Board's view has always been that at that point the individual employees should be left free to make a purely personal decision as to how he should vote.

The Board in *Wackenhut Security*, [1975] OLRB Rep. Oct. 738, made it clear that the prohibition can extend to all forms of propaganda, and that the result of a violation will in each case depend upon an assessment of all of the relevant circumstances. Particularly where, as here, the alleged propaganda goes to the heart of the employment relationship and job security, the circumstances surrounding it must be closely scrutinized by the Board.

8. In the present case, the Board is satisfied that the applicant has taken reasonable steps to ensure the observance of the "silent period" by its supporters, and that the actions of Mr. Thomas here in dispute were outside of the applicant's control. This raises some hard issues for the Board. To what extent are incidents of this kind to result in a successful party losing the benefit of an election victory, and the necessity of a further vote taking place? Is it

appropriate to expect compliance with the Registrar's direction by employees acting outside the control of either party? Is it necessary to attempt to monitor the informal conversations between employees in the days preceding a vote on the very subject which is likely to be uppermost in their minds at that point?

9. The Board has grappled with these problems in the past, and has developed a policy which neither gives to such informal activities a weight out of proportion with their true impact, nor, on the other hand, creates a licence for the parties to do indirectly what they cannot do directly. In *Royal Hotel*, for example, (unreported) Board File No. 2630-80-R, released August 10, 1981, the Board stated at paragraph 7:

... We find it difficult to characterize a conversation between three employees in the bargaining unit [at a party] on the Saturday evening prior to a representation vote as campaigning within the meaning of the term campaigning which is prohibited by order of the Registrar in a representation vote.

At the same time, the Board from its earliest cases has left no doubt that employees in the bargaining unit were "interested persons" within the meaning of the Registrar's direction, and that a violation by one of them of the silent period *could* result in vitiation of the election. See *Ontario Steel Products*, [1961] OLRB Rep. Aug. 174; and *International Nickel Company Limited*, 62 CLLC ¶16,257. The position of the Board is well summarized in *Kimberly-Clark Limited*, [1977] OLRB Rep. Sept. 599, at paragraph 9:

Obviously, it would unduly prejudice the parties to a representation vote if the vote could always be automatically invalidated by virtue of breaches of the silent period by persons whose conduct is beyond the parties' reasonable control. Having found a disregard of the silent period the Board therefore must ask whether the party concerned took reasonable precautions to avoid or prevent any breach. If it is satisfied that the party has exercised the necessary care and that the breaches are neither so serious nor so widespread as to call into question the results of the vote, the Board will allow the vote to stand. Where it is found that isolated infractions are the work of rank and file employees who are not under the control of the union and that the union did all that can be reasonably expected to prevent those breaches, the Board may decide not to disturb the vote. (*Rheem Canada Limited*, [1965] OLRB Rep. July 284; *Marsland Engineering Limited*, [1972] OLRB Rep. Dec. 1009.)

See also *Tend-R-Fresh Plant*, [1977] OLRB Rep. Jan. 22. The Board, in other words, applies its usual test of whether the impugned activity "was likely to and intended to influence the result of the vote" (*Ontario Steel Products*, *supra*), taking into account that the statement is made only by a rank-and-file employee.

10. In light of the above, what can be said about the present case? The first item of note is that the activities of Mr. Thomas were reported almost at once to Mr. Bizier's foreman, and the foreman saw fit to do nothing about it. The applicant argues that this amounted to condonation by the respondent, and is in itself sufficient to dispose of the charge. Indeed, the Board has said in *Chateau Gardens*, [1977] OLRB Rep. Jan. 12, at paragraphs 8 and 9:

8. The Board finds that the CLAC was under a duty to exercise some dispatch in the filing of its charges once it became known that another party to the dispute was in breach of the Registrar's direction. The Board is of the view that the purpose of the imposition of the silent period is to prevent any one party from gaining an unfair advantage with respect to electioneering. If the circumstances described to the Board in the CLAC's evidence was true and had due diligence with respect to the wrongsides being exercised, then adjustments could have been made to correct the alleged shortcoming. In other words, it does not lie in the mouth of a party to exploit to its own advantage a rule that was designed to assure fairness in the conduct of the vote. We find that a party cannot "lie in the bushes" and await the outcome of a vote and when it learns that the result was not amenable to its liking seek a second representation vote on the basis of a breach of a rule that could have been brought to the Board's attention in advance of the taking of the vote. (See: *R: Pure Spring (Canada) Ltd. et al* case, an unreported decision of The High Court per King J., dated February 21, 1965.)

9. In the normal circumstances, had due diligence been exercised in the filing of the allegations, the Board may very well have directed that the ballot box be sealed pending the disposition of the evidence filed in support of the charges. Or, the Board may very well have dispatched a Labour Relations Officer to investigate the respondent's premises and upon those findings the Board may very well have cancelled the holding of the vote and scheduled it for another day to permit prejudiced party to recoup what lost advantage had accrued as a result of the impugned electioneering. Whatever the adjustments that could have been made prior to the holding of the vote, we are satisfied that the CLAC's conduct in delaying the filing of the charges until after an unhappy result was known deprived the Board of any such opportunity. The Board is confident that our rules were not designed to allow a party in these circumstances to have "two bites of the cherry" where one may have sufficed. As a result, the Board is satisfied having regard to all of the evidence and the ensuing concerns with respect to continued viable collective bargaining that the CLAC ought to be foreclosed from filing its objections. (See: *Lecours Lumber Company Ltd.* case, [1972] OLRB Re. Nov. 982.)

11. A natural skepticism arises when a party raises a complaint about another's election conduct only *after* the result is known. In the present case, management's interest in the outcome of the applicant's organizing efforts had already become common knowledge, at the time Mr. Bizier's foreman was apprised of Mr. Thomas' activities. The Board finds that management was in a position to at least cut short the circulation of the rumour about which it now complains, but did not. The Board does not, however, rest its decision in this case on the principle of condonation. Rather, the Board views the foreman's reaction as a reflection of the ambiguity and lack of impact of the "rumours" themselves. Having regard to the nature of the impugned statements, the source of the speculation in which employees were engaging, and the person by whom the statements were made, the Board is not satisfied that the statements were such as can be said, on the balance of probabilities, to have unfairly influenced the outcome of this vote.

12. The Board finds that the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act*.

13. Having regard to the agreement of the parties, the Board further finds that all employees of the respondent in the Municipality of Metropolitan Toronto, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for the more than 24 hours per week and students employed during the school vacation period, constitute a unit of employees of the respondent appropriate for collective bargaining.

14. The Board is satisfied that not less than thirty-five per cent of the employees of the respondent in the bargaining unit were members of the applicant at the time the application was made.

15. On the taking of the pre-hearing representation vote directed by the Board, more than fifty per cent of the ballots cast were cast in favour of the applicant.

16. A certificate will issue to the applicant.

17. The Registrar will destroy the ballots cast in the pre-hearing representation vote taken in this matter following the expiration of 30 days from the date of this decision, unless a statement requesting that the ballots should not be destroyed is received by the Board from one of the parties before the expiration of such 30-day period.

DECISION OF BOARD MEMBERS W. H. WIGHTMAN AND O. HODGES;

1. On the facts of this case, we have no hesitation in joining in the conclusion of the Vice-Chairman. In fact, this case in our view is another demonstration of the kind of unnecessary litigation which the Board's "silent period" serves to attract. It may well be that the time has come for the Board to consider dispensing with the "silent period" altogether.

0493-81-R International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (U.A.W.), Applicant, v. **Tri-Canada Inc.**, Respondent, v. Tri-Canada Employees' Association, Intervener #1, v. United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 46, Intervener #2.

Certification – Trade Union Status – Employee Association formed by three employees opposed to collective bargaining – Employer supplying employee list – Whether association supported by employer – Board policy where new union formed in the shadow of another union's campaign

BEFORE: R. O. MacDowell, Vice-Chairman, and Board Members B. L. Armstrong and W. H. Wightman.

APPEARANCES: *L. A. MacLean, S. Krashinsky, H. Carl Anderson and Lorna Moses for the applicant; J. P. Wearing for the respondent; M. G. Horan and Rudy Koslowsky for intervener #1; Susan Stewart for intervener #2.*

DECISION OF R. O. MACDOWELL, VICE-CHAIRMAN, AND BOARD MEMBER B. L. ARMSTRONG; October 20, 1981

1. The name: "Tri-Canada Limited" appearing in the style of cause of this application as the name of the respondent is amended to read: "Tri-Canada Inc."

2. This is an application for certification in which the applicant initially requested the taking of a pre-hearing representation vote. By an earlier decision reported in [1981] OLRB Rep. June 794 (and for the reasons more particularly set out therein), the Board deferred the taking of such vote until intervener #1 had an opportunity to prove its status as a trade union, and demonstrate its right to participate in the vote and appear on the ballot. A hearing for that purpose was held on July 17, 1981. The statutory definition of "trade union" reads as follows:

1-(1) In this Act,

• • •

(p) "trade union" means an organization of employees formed for purposes that include the regulation of relations between employees and employers and includes a provincial, national, or international trade union, a certified council of trade unions and a designated or certified employee bargaining agency.

For ease of reference, intervener #1 will hereinafter be referred to simply as the intervener.

3. Rudy Koslowsky, the president of the Tri-Canada Employees' Association, was the only witness to give evidence concerning its origins. Koslowsky has been an employee of the respondent for fifteen years, and in the Spring of 1981, he was a member of an employee "safety committee" which had also been in existence for some years and through which there had been periodic discussions with management about safety rules and working conditions.

Ivan Lancaric, and Jerry Kakish — the other first principals and officers of the intervener — were also members of that committee.

4. Koslowsky was quite candid about his views respecting trade unions. He told the Board that he “didn’t like unions”, he didn’t think the employees in the plant needed a union, he was opposed to paying union dues, and he thought that he was better off with the existing system of individual bargaining between himself and his employer. This opposition to collective bargaining is long-standing and deep-seated, but prior to April of 1981 it had no concrete focus.

5. In April of 1981, Koslowsky learned that the Boilermakers’ union might have an interest in representing employees of the respondent. The respondent was then contemplating acquiring another firm where that union was the bargaining agent, and there was apparently some concern that it would seek to extend its bargaining rights to the Tri-Canada operation. The respondent called a meeting of its employees to advise them of the potential acquisition, but, according to Koslowsky, there was no discussion of the Boilermakers’ union. Koslowsky could not recall precisely how he had learned that the union had made a “successor rights” application, or that the application had subsequently been withdrawn as premature; but, in any event, he, Kakish and Lancaric, decided to do what they could to keep a union out of the plant.

6. The opposition to the union took several forms. Koslowsky called a meeting of employees in the company cafeteria immediately after work to discuss the situation and mobilize support for his position. Some forty employees attended. Koslowsky testified that the employer knew of the meeting but no managerial personnel attended or interfered because none had been invited. At that meeting he expressed his views about the desirability of maintaining the “non-union” status quo.

7. In addition to their personal lobbying against the introduction of a union in the plant, the three employees contacted a solicitor to explore ways of blocking any representation application which might subsequently be made. Two methods were mentioned: forming an employee association; and circulating a petition in opposition to the union. The latter method was the one which was selected, and a number of documents bearing the heading “we are opposed to joining a trade union at this time” were prepared and typed by Bob Harris (an employee in the respondent’s production office) and subsequently circulated on company premises and company time by Koslowsky, Kakish and Lancaric. The anti-union documents consisted of envelopes which the employees were asked to sign and return, and a petition expressing opposition to joining a union. These were then retained by Koslowsky in case the Boilermakers’ union later sought bargaining rights. Ultimately however, no such application was made, and nothing more was done.

8. It is evident that the sole purpose of this activity was to block the formation of an “outside”, and clearly independent bargaining agent. There was no real interest in establishing a collective bargaining relationship with the respondent. When it became apparent that the Boilermakers’ union was not going to seek bargaining rights, Koslowsky, Kakish and Lancaric, were content to maintain the status quo. No attempt was made to form an employee association until some weeks later when Koslowsky learned that a second union — the U.A.W. — had expressed an interest in representing the respondent’s employees, and was acquiring significant support among them.

9. Once again, the three employees contacted their solicitor, and at a meeting on June 2, 1980, it was decided that, this time, the appropriate vehicle to block the U.A.W.'s organizing drive was the creation of a rival "in-plant" employee association. This method of opposition, it might be noted, offers a significant advantage over the "petition" process which the union opponents had previously employed. A petition or other statement in direct opposition to a union's certification, is subject to Rule 48 of the Rules of Practice; and, in accordance with Rule 48(5), the Board will normally inquire into the circumstances surrounding the origination and circulation of the opposition statement, in order to satisfy itself that the employees who signed it, have done so voluntarily. The Board has, heretofore, not undertaken such inquiry in the case of opposition to an applicant trade union which takes the form of membership in or support of another employee organization.

10. A meeting for the purpose of forming an employee association was scheduled for June 4, 1981. The U.A.W. filed its certification application on June 3rd. Formal notice of that application was received and posted by the company on June 5th; but since the union's organizing campaign pre-dated the application, the campaign was common knowledge among employees in the plant, and union organizers were openly circulating leaflets outside the plant premises, it is not unreasonable to infer that the respondent was aware of the campaign prior to receiving formal notice.

11. Koslowsky admits that he viewed the formation of an "in-plant association" as a means to frustrate the U.A.W.'s organizing campaign. He had no idea how a trade union should be formed or what steps had to be taken to create a viable independent employee bargaining agency. Nor was there any intention to hold a meeting of the employees to discuss this matter, or solicit their input concerning the objects of the employee association, its dues structure, the selection and responsibilities of its officers, and so on. Koslowsky was well aware that the formation of a rival organization might well be a contentious issue among the employees, and for this reason, he decided to proceed surreptitiously, with only himself and his two colleagues initially involved. The structure, objects and internal organization of the association were left entirely to their solicitor to be dealt with in the constitution, or to be decided by the association's officers once the organization had been formed and the officers had been selected. These officers were Koslowsky, Kakish, and Lancaric themselves.

12. The meeting to form the association took place as scheduled on June 4, 1981 in the solicitor's office. Kakish, Koslowsky and Lancaric, were the only employees in attendance. Koslowsky testified that (contrary to what appears in the minutes) there was little discussion about the constitution or the steps which they were taking to form a trade union. The three employees simply accepted what their solicitor had drafted, and followed his instructions as to what must be done. The minutes were prepared in advance of the meeting, and the appropriate names were simply filed in as each step was completed with a "motion from the floor", "second", and vote — or, in the case of the selection of officers, acclamation in the designated position. The entire procedure, of course, is somewhat artificial, since there were only three individuals taking part in the meeting. It was Koslowsky, Kakish and Lancaric, who ratified the constitution, became members, and selected each other for the various offices on the executive of the association. Koslowsky was selected as president and chairman of the negotiating committee; Lancaric is the vice-president; and Kakish is the secretary-treasurer. It appears that by virtue of Article 16.01 of the constitution these individuals will control the organization and constitute the Association's negotiating committee during the initial year of its operation. Once the officers were acclaimed, the meeting closed. The next day the three

employees solicited virtually all of the membership evidence supporting an intervenor's application for certification filed on June 9, 1981.

13. Counsel for the applicant contends that these steps taken by the three employees are insufficient to create a "trade union" within the meaning of section 1(1)(p) of the Act. In his submission, the intervenor is nothing but a "paper organization" without foundation or roots, and created solely to frustrate the U.A.W.'s organizing campaign not to engage in collective bargaining. The intervenor, he argues, is a "mere shell", entirely controlled by individuals with no commitment to the object of collective bargaining which the intervenor's constitution purports to be its primary purpose. All of the evidence, he asserts, points to this conclusion, including the early antipathy of the three employees to trade unions, their circulation of a petition against union representation, the expressed preference by Koslowsky, the president of the Association for individual bargaining, the absence of any activity to promote collective bargaining once the possibility of unionization by an outside organization had passed, the decision not to involve other employees in the formation of the Association, and clandestine meetings, and the willingness to leave all of the critical features of the Association's structure to their solicitor. Counsel submits that the Association is, in reality, no different from the anti-union petition which was previously created, and should be viewed as such. In his submission, it is not a trade union either desiring or capable of assuming the collective bargaining responsibilities governed by the Act.

14. Section 1(1)(p) does not prescribe any particular form which a trade union should take. There are no statutory criteria as to what is sufficient to constitute a "trade union" other than those contained in the definition itself. In particular, there is nothing in the legislation which prevents a small group of employees from forming themselves into a trade union, nor is there anything which prohibits a free and independent organization of workers who, by their own choice, have limited their collective activities to one company. That is precisely what the Board had before it in *Ontario Hospital Association (Blue Cross)* [1981] OLRB Rep. June 763, and in that case the Board found that a trade union had been successfully formed by only four employees. Indeed, save for the changes in the names, the union constitution and minutes of the founding meeting in the *Blue Cross* case, are *identical* to those used in the instant case. But this is hardly surprising. The solicitor who prepared them was the same in both cases, and there is nothing unusual or sinister about using a form of documentation which has already been approved by the Board (although the facts may contradict or "speak louder" than a particular form of words used in the constitution). One might well be doubtful about the depth of the three employees commitment to collective bargaining, or their ability to energetically, wholeheartedly, or effectively represent the interests of their fellow employees; but, a trade union's status does not depend upon the Board's assessment of its potential effectiveness as a bargaining agent so long as it is truly and fully independent of employer influence.

15. The bargaining process between employers and employees always implies, in addition to their common interest, some degree of conflict between the immediate economic interests of the bargainers — the payer and receiver of wages. This conflict of interest will necessarily co-exists with their common interest in the welfare of the enterprise from which they both derive their income; and we do not mean to suggest that harmonious relations do not exist between employers and trade unions. But short-run conflicts of economic interest are inevitable, and if they are to be resolved through the process of collective bargaining, it is highly inappropriate for the agency which represents one party to the bargain, to be in any measure under the influence of the other. Collective bargaining by its very nature requires an

arm's length relationship between the bargaining parties, and there are a number of statutory provisions designed to ensure that this is the case. These included the following:

1-(3) Subject to section 90, for the purposes of this Act, no person shall be deemed to be an employee,

• • •

(b) who, in the opinion of the Board, exercises managerial functions or is employed in a confidential capacity in matters relating to labour relations.

13. The Board shall not certify a trade union if any employer or any employers' organization has participated in its formation or administration or has contributed financial or other support to it or if it discriminates against any person because of his race, creed, colour, nationality, ancestry, age, sex or place of origin.

48. An agreement between an employer or an employers' organization and a trade union shall be deemed not to be a collective agreement for the purposes of this Act,

- (a) if an employer or an employers' organization participated in the formation or administration of the trade union or if an employer or an employers' organization contributed financial or other support to the trade union; or
- (b) if it discriminates against any person because of his race, creed, colour, nationality, ancestry, age, sex or place of origin.

64. No employer or employers' organization and no person acting on behalf of an employer or an employers' organization shall participate in or interfere with the formation, selection or administration of a trade union or the representation of employees by a trade union or contribute financial or other support to a trade union, but nothing in this section shall be deemed to deprive an employer of his freedom to express his views so long as he does not use coercion, intimidation, threats, promises or undue influence.

16. Sections such as these have been part of the legislative scheme since the first *Labour Relations Act*, and sections 13 and 48 are perhaps the most significant. Their effect is abundantly clear. The Board is prohibited from certifying any organization which has received employer support and such organization cannot conclude a valid collective agreement within the meaning of the Act. Section 46 permits the parties to a collective agreement to include a dues deduction provision or a provision allowing union officials to attend to union business on company premises or company time, but these exemptions involve commonly negotiated devices to promote the orderly administration of an *established* bargaining relationship, and it is significant that the Legislature considered it necessary to mention them specifically in order to remove any question concerning the potential conflict with section 48. There may be other

forms of employer-employee cooperation in an established bargaining relationship which do not compromise the independence of the employee bargaining agency, and consequently do not raise the mischief which these sections were designed to avoid. Each case must be considered on its own facts.

17. As we have already noted, all three principals of the Employee Association were on a pre-existing employee committee, Koslowsky was permitted to hold a meeting in opposition to the Boilermakers' union on company premises, a petition was typed for him by an employee in the production office, and the petition in opposition to that union was freely circulated on company premises and company time. These incidents suggest, but do not by themselves prove, tacit employer support for Koslowsky's anti-union activities; and we cannot conclude that this evidence, in itself, is strong enough to support a finding of employer support for the employee association which was subsequently formed in face of the U.A.W.'s organizing campaign. Of much more significance in this regard is the incident of the "employee list" which Koslowsky obtained from Tony Malaca, the respondent's plant manager.

18. Koslowsky was carefully examined and cross-examined on all of the steps leading up to the formation of the intervener. Unfortunately, his evidence was unsatisfactory in some respects. Initially he denied that there had been any discussion with any member of management about any trade union; but he admitted that the respondent's management knew he was forming an employee association. Since, according to Koslowsky, the decision to do so was only taken on June 2nd, and involved only three employees acting surreptitiously, and on their own time, it is a little difficult to see how the respondent could have known about their intention unless it was told. Initially, Koslowsky told the Board that he had not discussed the association with Malaca, and that he [Koslowsky] didn't know whether on October 4th Malaca knew of his intention to visit a lawyer. On further cross-examination, however, Koslowsky admitted that he had told Malaca about his intention to form an employee association, and had asked for a list of employees and their telephone numbers to assist him. According to Koslowsky, he told Malaca that he needed the list because he was going to see a lawyer, and might need a list of names to compare with "certain applications" (which he expected to receive from his solicitor). Koslowsky told Malaca that he should have a list of employee names and telephone numbers in case he needed it, and, at the time, he assumed that Malaca was aware of the purpose of his visit to the lawyer. Koslowsky told the Board that he did not know the names of many of the employees in the bargaining unit, and had no access to their telephone numbers; but he denied that he subsequently made any use of this information in the intervener's organizing campaign. Malaca did not give evidence.

19. We find that Tony Malaca, the plant manager of the respondent, supplied Koslowsky with a list of the employees' names and telephone numbers, and further that when he did so, he was aware both of Koslowsky's role in forming an employee association and Koslowsky's intention to use the list for that purpose. But does this constitute "other support" within the meaning of section 13? In order to understand why it must, it is necessary to appreciate the tactical importance of this information.

20. As a practical matter, an employer, through his possession of employee names and addresses and phone numbers, as well as his ability to communicate fully with his employees on company premises, is ensured of a continuing opportunity (subject to section 64) to inform the employees of his views with respect to trade union representation. On the other hand, a labour organization without a list of employee names and addresses, with no automatic access to

plant premises, and no right to conduct its activities on company premises or company time, ordinarily has no method by which it can be certain of reaching all of the employees, or even accurately determining their numbers (an important consideration when a union must organize a fixed percentage of the work force within a relatively short period of time). This is not to deny the existence of various means by which a union may be able to communicate with employees or forecast their numbers without possessing their names and telephone numbers. It is rather to say what seems to us to be obvious — that a list of employee names and phone numbers can be of real assistance to an organizing union. Such information is simply not readily available from sources other than the employer. The names of some employees may be secured with the assistance of sympathetic fellow employees, but many employees may be unknown to their fellows or known only by first names or nicknames, and some employees will inevitably be on other shifts, or on layoff, or sick leave, and thus not readily reachable. In summary then, not only is this information important to the union, but in the absence of employer disclosure, it is extremely difficult to obtain.

21. In the Board's experience, employers are well aware of the tactical value of an employee list, and are usually extremely reluctant to reveal it (see for example the employer's position in: *Extendicare Diagnostic Services Limited*, [1981] OLRB Rep. Aug. 1134. Indeed, (and ironically in view of the evidence subsequently adduced) that is precisely the position taken by counsel for the respondent in the instant case when, at the opening of the hearing, a minor issue arose between the U.A.W. and the respondent concerning the identity of employees in the unit, and it was suggested by the Board that the matter could most readily be resolved by their joint perusal of the list submitted by the respondent with its reply to the application for certification. There is nothing exceptional about the position taken by counsel, but it serves to underline the tactical significance which he and most employers generally accord to this information. The Board itself has taken the same view in those cases where an employer's illegal conduct has significantly undermined a union's organizing campaign, and ordering the employer to provide a list of employee names, addresses and telephone numbers can help redress the damage done by the employer's illegal conduct and get the organizing campaign back on track. Finally, it might be noted that in British Columbia a series of legislative initiatives designed to facilitate trade union organizational efforts included a 1975 amendment (since repealed) permitting a trade union before commencing its organizing campaign to apply to the British Columbia Labour Relations Board for access to the employees' names, addresses and telephone numbers. (For an analysis of the policy underlying this section see: *British Columbia Rail Company and Office and Technical Employees' Union*, [1976] 1 Can. L.R.B.R. 470.)

22. It is clear that the possession of a list of employee names and phone numbers is a significant asset to an individual contemplating the formation of a trade union, and in the absence of any explanation from Mr. Malaca, we must conclude that he was actively seeking to assist Koslowsky in his efforts to form the intervener. It is hardly likely that he would have done the same for a truly independent union such as the U.A.W. (certainly counsel's reticence with respect to the list is the more usual employer reaction), and we cannot find on the evidence that the support was given either inadvertently, or by an individual in a managerial capacity acting on his own, and contrary to the employer's interests. On the contrary, the fact that the employee list was so readily given to the intervener raises precisely the kind of question concerning its independence to which section 13 is directed. And where, as here, the intervener has no previous bargaining history, and was formed in secret, by a small group of union opponents, in the shadow of another union's organizing campaign, it is incumbent upon those

employees, and the particular responsibility of the Board, to ensure that section 13 is not contravened. This does not mean that union opponents may not react to an organizing campaign by forming another employee organization. It is simply that if they do so — and especially in circumstances similar to those in the instant — the Board must give careful consideration to any evidence suggesting a non arm's length relationship with the employer, and to any allegations or evidence respecting the voluntariness of the employee organization's membership evidence.

23. We find that the employer support given by Malaca to the intervener offends the prohibition in section 13, and prevents the Board from certifying the intervener. The intervener's application for certification is therefore dismissed.

24. In view of the foregoing, it is unnecessary to finally decide whether the intervener is a "trade union" within the meaning of the Act.

25. It appears to the Board on an examination of the records of the applicant and the records of the respondent that not less than thirty-five per cent of the employees of the respondent in the voting constituency hereinafter described were members of the applicant at the time the application was made.

26. Having regard to the agreement of the parties, the Board directs that a representation vote be taken of the employees of the respondent in the following voting constituency:

All employees of the respondent in Mississauga, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff and those employees presently represented by the Plumbers & Steamfitters Union Association Local 46.

27. Those entitled to vote shall be all employees of the respondent in the voting constituency on June 12, 1981, who have not voluntarily terminated their employment or who have not been discharged for cause between June 12, 1981 and the date the vote is taken.

28. Voters will be asked to indicate whether or not they wish to be represented by the applicant in their employment relations with the respondent.

29. The matter is referred to the Registrar.

DECISION OF BOARD MEMBER W. H. WIGHTMAN;

1. The question as to whether employees should be free to choose between not being represented by any association, or being represented by a locally formed association or being represented by an association with broader national or international ties is not at issue. Clearly freedom of association must mean quite literally that employees must be free to make any of the above choices and the role of the Board is to ensure as best as it can that the choice does reflect a decision freely made by the employees.

2. Finding that the provision of a list of names and addresses of employees by an agent of the employer to a group of organizers seems to me to take us a step beyond the intent of the

Act in terms of the role of the Board. Nor is it my experience that employers necessarily are as secretive about this type of information as the majority have found. There is an understandable reluctance to make available such information if they have reason to believe it would be used in a manner it considered improper such as for sales solicitation, or if the numbers of persons involved were so large as to imply a significant time and cost burden to produce such lists.

3. Alternatively, in my experience some employers do provide such information to individuals or groups of employees for purposes such as charity canvassing and social events. One wonders if the Board decision might have been different in this case if the evidence had been that the employees had misled the Plant Manager as to their intended use of the list? Does this decision leave employers in the position of having to refuse to divulge such information for any purpose? Does it preclude giving such information with respect to any individual employee?

4. These questions aside, my main concern is that the ultimate decision of each of the individual employees who joined in support of the employee's association did so without knowledge as to how the organizers for the association had come by their name and that their decision to join the association was a matter of free choice. These employees were at arm's length from the employer and the absence of any allegations is indicative of the membership evidence being voluntary. For the Board to interfere with that freedom of choice seems to me to break new and uncertain ground.

5. On balance, I believe the rights and interests of individual working people should take precedence over those of institutions and I would have granted status to the employees' association. Given the decision of the majority it is likely that, if their will persists, the employees will be back before this Board at a future date.

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APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR BOARD DURING SEPTEMBER 1981

BARGAINING AGENTS CERTIFIED

No Vote Conducted

1768-80-R: Canadian Food and Associated Services Union, (Applicant v. Windsor Arms Hotel Limited, (Respondent).

Unit: "all employees of the respondent in the Municipality of Metropolitan Toronto, employed at the Windsor Arms Hotel, Noodles, and the Bay Streetcar, save and except supervisors and assistant supervisors exercising managerial functions, persons above the rank of supervisor and assistant supervisor, office staff, musicians, management trainees, maitre d'hotel, chefs, sous-chefs, chefs de parties who exercise managerial functions, persons regularly employed for not more than twenty-four hours per week, students employed during the school vacations period and employees covered by subsisting collective agreements". (11 employees in unit). (*Clarity Note*).

2494-80-R: Service Employees Union, Local 204 Affiliated with A.F. of L., C.I.O., C.L.C., (Applicant) v. K Mart Canada Limited, (Respondent) v. Group of Employees, (Objectors).

Unit #1: "all employees of K Mart Canada Limited employed at its Bayview Village Shopping Centre store in the Municipality of Metropolitan Toronto, save and except department managers, persons above the rank of department manager, management trainees, pharmacists, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period". (53 employees in unit). (*Having regard to the agreement of the parties*).

Unit #2: "all persons of K Mart Canada Limited regularly employed at its Bayview Village Shopping Centre store in the Municipality of Metropolitan Toronto for not more than 24 hours per week and students employed during the school vacation period". (72 employees in unit). (*Having regard to the agreement of the parties*).

2708-80-R: Ontario Nurses' Association, (Applicant) v. Community Nursing Homes Limited, (Respondent).

Unit #1: "all registered and graduate nurses employed by the respondent in a nursing capacity at Village Retirement Centre in Pickering, save and except director of nursing, persons above the rank of director of nursing and persons regularly employed for not more than twenty-four hours per week". (7 employees in unit).

Unit #2: "all registered and graduate nurses employed by the respondent in a nursing capacity at Village Retirement Centre in Pickering who are regularly employed for not more than twenty-four hours per week, save and except director of nursing and persons above the rank of director of nursing". (13 employees in unit).

2825-80-R: United Food and Commercial Workers International Union, A.F.L., C.I.O., C.L.C., (Applicant) v. Colonial Cookies, a Division of Beatrice International (Canada) Ltd., (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent employed at Kitchener, Ontario, save and except foreladies/foremen and other persons at or above the rank of forelady/foreman, plant nurse, transport driver, office and sales staff". (266 employees in unit). (*Having regard to the agreement of the parties*).

0017-81-R: Teamsters, Chauffeurs, Warehousemen and Helpers Local Union No. 91, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. Brink's Canada Limited, (Respondent).

Unit: "all employees of the Respondent at Ottawa, save and except, head cashier, coin room supervisor, persons above the ranks of head cashier and coin room supervisor, office and sales staff, courier staff, money room staff, fleet supervisor, dispatchers, those persons covered by a subsisting collective agreement, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period". (7 employees in unit). (*Having regard to the agreement of the parties*).

0277-81-R: Retail, Wholesale & Department Store Union, (Applicant) v. Queensway Electric Supply Co., (Respondent).

Unit: "all employees of the respondent at Metropolitan Toronto, save and except manager, persons above the rank of manager, assistant manager-purchasing agent, office and clerical staff, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period". (7 employees in unit).

0437-81-R: Service Employees Union, Local 204, A.F. of L., C.I.O., C.L.C., (Applicant) v. Gooden Holdings Limited, c.o.b. as Van Del Manor Nursing Home, (Respondent).

Unit: "all registered and graduate nurses in the employ of the respondent in Metropolitan Toronto, save and except nursing director, supervisors, persons above the rank of supervisor". (9 employees in unit).

0461-81-R: Canadian Union of Public Employees, (Applicant) v. Mon Sheong Foundation (Home for the Aged), (Respondent).

Unit: "all employees of the respondent in Metropolitan Toronto save and except supervisors and persons above the rank of supervisor". (21 employees in unit).

0464-81-R: Canadian Union of Public Employees, (Applicant) v. Brantford Public Library, (Respondent).

Unit: "all employees of Brantford Public Library in the City of Brantford, save and except chief librarian, business administrator, the head of St. Paul Ave. branch, department heads, persons above the rank of department head, secreatry to the chief librarian, pages, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period". (33 employees in unit).

0615-81-R: Canadian Union of Public Employees, (Applicant) v. Bellevue Residence, (Respondent).

Unit #1: "all employees of the respondent in Orleans, Ontario, save and except supervisors, persons above the rank of supervisor, registered and graduate nurses, registered nursing assistant, office and clerical staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period". (11 employees in unit).

Unit #2: "all employees of the respondent in Orleans, Ontario, regularly employed for not more than 24 hours per week and students employed during the school vacation period save and except supervisors, persons above the rank of supervisor, registered and graduate nurses, and office and clerical staff". (5 employees in unit). (*Having regard to the agreement of the parties*).

0667-81-R: The International Union of Bricklayers and Allied Craftsmen, (Applicant) v. Mascon Limited, (Respondent).

Unit: "all bricklayers, bricklayers' apprentices, stonemasons and stonemasons' apprentices in the employ of the respondent in the industrial, commercial, and institutional sector of the construction industry in the Province of Ontario and all bricklayers, bricklayers' apprectices, stonemasons and

stonemasons' apprentices in the employ of the respondent in all other sectors in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman". (14 employees in unit).

0707-81-R: Labourers' International Union of North America, Local 183, (Applicant) v. Cancian Construction Ltd., (Respondent) v. The Carpenters' District Council of Toronto and Vicinity, United Brotherhood of Carpenters and Joiners of America, on behalf of Local Union 1190, (Intervener).

Unit: "all carpenters, carpenters' apprentices and construction labourers in the employ of the respondent in Metropolitan Toronto, The Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working formen". (12 employees in unit). (*Having regard to the agreement of the parties*).

0764-81-R: International Brotherhood of Painters and Allied Trades — Local Union 1891, (Applicant) v. Mar-ot Painting Contractors Limited, (Respondent).

Unit: "all painters and painters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all painters and painters' apprentices in the employ of the respondent in all other sectors in Metropolitan Toronto, The Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman". (2 employees in unit).

0813-81-R: Canadian Union of Public Employees, (Applicant) v. Nel-Gor Castle Nursing Home (Carleton Place), (Respondent).

Unit: "all employees of the respondent in Carleton Place, Ontario, save and except supervisors and persons above the rank of supervisor, graduate and undergraduate nurses, registered nursing assistants, office and clerical staff, students employed during the school vacation period and persons regularly employed for not more than 24 hours per week". (19 employees in unit). (*Having regard to the agreement of the parties*).

0836-81-R: United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 463, (Applicant) v. Dawson-Coleman 1974 Ltd., (Respondent),

Unit: "all plumbers and plumbers' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all plumbers and plumbers' apprentices in the employ of the respondent in all other sectors in the geographic Townships of Hope, Hamilton, Haldimand and Alnwick in the County of Northumberland (geographic Township means all municipal entities within the geographic Township); and all plumbers and plumbers' apprentices in the employ of the respondent in all other sectors in the Counties of Peterborough, Victoria and the Provisional County of Haliburton, save and except non-working foremen and persons above the rank of non-working foreman". (8 employees in unit).

0852-81-R: United Brotherhood of Carpenters and Joiners of America, Local 1190, (Applicant) v. Leda Carpenters Limited, (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman". (2 employees in unit).

0861-81-R: United Food and Commercial Workers International Union A.F.L., C.I.O., C.L.C., (Applicant) v. Cara Operations Limited (Air Terminals Restaurant Division), (Respondent) v. Hotel, Restaurant and Cafeteria Employees Union, Local 75, (Intervener) v. Group of Employees, (Objectors).

Unit: #1: "all employees of the respondent, Cara Operations Limited (Air Terminals Restaurant Division), employed at Terminal 1 and Terminal 2 at Toronto International Airport, Malton, Ontario, in its restaurants and lounges, save and except maitre d', chefs, supervisors, those above the rank of maitre d', chef and supervisor, office and clerical staff, buyers, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period". (224 employees in unit). (*Having regard to the agreement of the parties*).

Unit #2: "all employees regularly employed for not more than twenty-four hours per week, and students employed during the school vacation period, by the respondent, Cara Operations Limited (Air Terminals Restaurant Division), at Terminal 1 and Terminal 2 at Toronto International Airport, Malton, Ontario in its restaurants and lounges, save and except maitre d', chefs, supervisors, those above the rank of maitre d', chef and supervisor, office and clerical staff and buyers". (127 employees in unit). (*Having regard to the agreement of the parties*).

0978-81-R: Ontario Public Service Employees Union, (Applicant) v. Bruce Peninsula & District Memorial Hospital, (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the Respondent at Wiarton, Ontario, save and except professional medical staff, registered graduate nursing staff, undergraduate nurses, paramedical employees, office and clerical staff, supervisors and persons above the rank of supervisor and those employees regularly employed for not more than 24 hours per week and students employed during the school vacation period". (37 employees in unit).

0989-81-R: Local Union 1669 United Brotherhood of Carpenters and Joiners of America, (Applicant) v. United Shelters Ltd., c.o.b. as Lisgar Construction; known as Construction Co. Ltd.; 281981 Ontario Limited, c.o.b. as Sola Developments Co., (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in the District of Thunder Bay, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman". (3 employees in unit).

0993-81-R: Labourers' International Union of North America, Local 506, (Applicant) v. Direzione Lavori of Canada Limited, (Respondent) v. Labourers' International Union of North America, Local 183, (Intervener).

Unit: "all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry of the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman and all construction labourers in the employ of the respondent in Metropolitan Toronto, The Regional Municipality of York and the county of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, excluding the industrial, commercial and institutional sector save and except non-working foremen, persons, above the rank of non-working foreman and persons covered by subsisting collective agreements, certificates issued by the Ontario Labour Relations Board or written voluntary recognition agreements". (5 employees in unit). (*Having regard to the agreement of the parties*).

0998-81-R: Labourers' International Union of North America, Local 607, (Applicant) v. Known Construction Company Limited, United Shelters Ltd., c.o.b. as Lisgar Construction Co., and 281981 Ontario Limited, c.o.b. as Sola Developments Co., (Respondent).

Unit: "all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all construction labourers in the employ of the respondent in all other sectors in the District of Thunder Bay, save and

except non-working foremen and persons above the rank of non-working foreman". (2 employees in unit).

1019-81-R: Ontario Nurses' Association, (Applicant) v. Canadian Red Cross Society, Ontario Division — Red Cross Hospital, Minden, Ontario, (Respondent).

Unit #1: "all registered and graduate nurses employed in a nursing capacity by the respondent at Minden, Ontario, save and except nursing administrator, persons above the rank of nursing administrator and persons regularly employed for not more than 24 hours per week". (5 employees in unit). (*Having regard to the agreement of the parties*).

Unit #2: "all registered and graduate nurses employed in a nursing capacity by the respondent at Minden, Ontario, regularly employed for not more than 24 hours per week save and except nursing administrator and persons above the rank of nursing administrator". (3 employees in unit). (*Having regard to the agreement of the parties*).

1021-81-R: Ontario Nurses' Association, (Applicant) v. Manitoulin Nursing Home, (Respondent).

Unit: "all registered and graduate nurses employed in a nursing capacity by Manitoulin Nursing Home. Gore Bay, Ontario, save and except the Director of nursing and persons above the rank of Director of nursing". (5 employees in unit). (*Having regard to the agreement of the parties*).

1027-81-R: Fur Workers' Union — Local 82, affiliated with United Food & Commercial Workers' International Union, AF of L-CIO-CLC, (Applicant) v. Alpha Shoe Corporation, (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent company in Metropolitan Toronto save and except forepersons, those above the rank of foreperson, office and sales staff, persons employed for not more than twenty-four hours per week, and students employed during the school vacation period". (41 employees in unit). (*Having regard to the agreement of the parties*).

1035-81-R: Retail, Wholesale and Department Store Union, AFL:CIO:CLC, (Applicant) v. Cochrane-Dunlop Limited, (Respondent).

Unit: "all employees of the respondent at Elliot Lake, save and except supervisors, persons above the rank of supervisor, office staff, outside sales staff and students employed during the school vacation period". (3 employees in unit). (*Having regard to the agreement of the parties*).

1036-81-R: Iron Workers District Council of Ontario Local Union 700, 721, 736, 759, 765 and 786, (Applicant) v. Equicon Engineering Ltd., (Respondent).

Unit: "all ironworkers and ironworkers' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all ironworkers and ironworkers' apprentices in the employ of the respondent in all together sectors in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman". (3 employees in unit).

1038-81-R: Ontario Public Service Employees Union, (Applicant) v. Renaissance Homes Inc., (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent in Oakville, Ontario, save and except the supervisor and persons above the rank". (9 employees in unit). (*Having regard to the agreement of the parties*).

1039-81-R: Labourers' International Union of North America Local 1036, (Applicant) v. M.B.L. International c.o.b. as Marantette Brothers Limited, (Respondent).

Unit: "all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman". (15 employees in unit).

1042-81-R: Service Employees International Union, Local 183 A.F. OF L., C.I.O., C.L.C., (Applicant) v. Pannell Holdings Ltd., c.o.b. as The Fireside Inn, (Respondent).

Unit: "all employees of the respondent in Picton, Ontario save and except bookkeeper and accountant, general manager and persons above the rank of general manager". (53 employees in unit). (*Having regard to the agreement of the parties*).

1055-81-R: United Cement, Lime and Gypsum Workers International Union, A.F.L., C.I.O., C.L.C., (Applicant) v. Canada Fans Ltd., (Respondent).

Unit: "all employees of the respondent in the Town of Picton, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff". (11 employees in unit). (*Having regard to the agreement of the parties*).

1064-81-R: United Brotherhood of Carpenters and Joiners of America Local 1190, (Applicant) v. R. and M. Grossi Carpentry, (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman". (5 employees in unit).

1066-81-R: United Brotherhood of Carpenters and Joiners of America Local Union 3054, (Applicant) v. Ziegler Lumber Limited, (Respondent).

Unit: "all employees of the respondent employed at Port Elgin, save and except the vice-president, persons above the rank of vice-president, and office and sale staff". (2 employees in unit).

1067-81-R: Teamsters Local Union 141, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. Chef Foods Limited, (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent working in London, Ontario, save and except foremen, persons above the rank of foremen, office and sales staff, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period". (13 employees in unit). (*Having regard to the agreement of the parties*).

1068-81-R: Hotel Restaurant and Cafeteria Employees Union, Local 75, (Applicant) v. Lord Stanley's Tavern, Owned and Operated by City Restaurants Canada, A Division of Citicom Inc., (Respondent).

Unit: "all employees of the respondent, at Lord Stanley's Tavern, save and except supervisors, persons above the rank of supervisor, office, sales and accounting staff, persons employed for less than 24 hours per week and students employed during the school vacation period". (41 employees in unit). (*Having regard to the agreement of the parties*).

1070-81-R: The Millwright District Council of Ontario, United Brotherhood of Carpenters and Joiners of America, on behalf of Locals 1007, 1244, 1410, 1425, 1592, 1669, 1916 and 2039, (Applicant) v. I.C.M. Mechanical Limited, (Respondent).

Unit: "all millwrights and millwrights' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all millwrights and millwrights' apprentices in the employ of the respondent in all other sectors in the Regional Municipality of Niagara and the County of Haldimand, save and except non-working foremen and persons above the rank of non-working foreman". (3 employees in unit).

1083-81-R: Canadian Union of Public Employees, (Applicant) v. The Board of Governors of the University of Western Ontario, (Respondent).

Unit: "all employees of the University of Western Ontario in the Maintenance Department of the Thompson Arena, London Campus, London, Ontario, save and except foremen, persons above the rank of foreman, office staff, persons regularly employed for not more than twenty-four hours per week and students employed during the school or university vacation period". (6 employees in unit). (*Having regard to the agreement of the parties*).

1084-81-R: Shopmen's Local Union No. 834 of the International Association of Bridge, Structural and Ornamental Iron Workers, (Applicant) v. Lambton Metal Works, (Respondent).

Unit: "all employees of the respondent at its shop or shops in Sarnia, Ontario, save and except foremen, persons above the rank of foreman, office and clerical staff, and persons covered by a subsisting collective agreement". (5 employees in unit). (*Having regard to the agreement of the parties*).

1085-81-R: Labourers' International Union of North America, Local 183, (Applicant) v. Edera Developments Limited, (Respondent).

Unit: "all carpenters, carpenters' apprentices and construction labourers in the employ of the respondent in Metropolitan Toronto, The Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman". (6 employees in unit). (*Having regard to the agreement of the parties*).

1086-81-R: Ontario Public Service Employees Union, (Applicant) v. Bruce District Emergency Services Ltd., (Respondent).

Unit: "all employees of the respondent in Bruce County, Ontario, save and except owners/operators, persons employed for not more than 24 hours per week and students employed during the school vacation period". (10 employees in unit). (*Having regard to the agreement of the parties*).

1087-81-R: Amalgamated Clothing & Textile Workers' Union, AFL-CIO-CLC, (Applicant) v. Stowe Woodward Company Limited, (Respondent).

Unit: "all employees of the respondent at its plant in North Bay, save and except foremen and foreladies, persons above the rank of foreman and forelady, office, clerical and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period". (9 employees in unit). (*Having regard to the agreement of the parties*).

1097-81-R: Ontario Public Service Employees Union, (Applicant) v. Glencoe-Alvinston Ambulance Service (Division of J. B. Gough and Son Limited, (Respondent).

Unit: "all employees of the respondent employed in the counties of Lambton and Middlesex, save and except supervisors and persons above the rank of supervisor, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period". (5 employees in unit). (*Having regard to the agreement of the parties*).

1103-81-R: Christian Labour Association of Canada, (Applicant) v. Paris Nursing Home Limited, (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent at Paris, Ontario, save and except registered nurses, head nurse, administrator, and office staff". (17 employees in unit). (*Having regard to the agreement of the parties*).

1105-81-R: United Brotherhood of Carpenters and Joiners of America Local 1190, (Applicant) v. Steve Radman Construction, (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman". (5 employees in unit).

1107-81-R: United Brotherhood of Carpenters and Joiners of America Local 1190, (Applicant) v. Holiday Carpentry, (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in Metropolitan Toronto, The Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman". (3 employees in unit).

1108-81-R: United Brotherhood of Carpenters and Joiners of America Local 1190, (Applicant) v. Steve Devesceri General Carpentry Contracting, (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in the County of Ontario (except the Townships of Pickering, Rama and Mara) and the County of Durham (except the Township of Hope), excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman". (9 employees in unit).

1109-81-R: United Brotherhood of Carpenters and Joiners of America Local 1190, (Applicant) v. F.E.D. Company, (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and Township of Pickering in the County of Ontario, excluding the industrial, commercial and Institutional sector, save and except non-working foremen and persons above the rank of non-working foreman". (7 employees in unit).

1111-81-R: Labourers' International Union of North America, Local 183, (Applicant) v. Gamen Paving & Construction Ltd., (Respondent).

Unit: "all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all construction labourers in the employ of the respondent in all other sectors in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman". (4 employees in unit).

1116-81-R: International Union of Operating Engineers, Local 793, (Applicant) v. Dufresne Piling Company (1967) Ltd., (Respondent).

Unit: "all employees of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all employees of the respondent in all other sectors in the regional Municipality of Ottawa-Carleton and the United Counties of Prescott and Russell, engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman". (19 employees in unit). (*Having regard to the agreement of the parties*).

1118-81-R: Canadian Union of Public Employees, (Applicant) v. The Corporation of the City of Oshawa, (Respondent).

Unit: "all office and clerical employees of the respondent in the Fire Department of the City of Oshawa, save and except administrative assistant to the Chief, persons above the rank of administrative assistant to the Chief, and persons covered by subsisting collective agreements". (3 employees in unit). (*Having regard to the agreement of the parties*).

1120-81-R: The Canadian Guards Association, (Applicant) v. The Board of Governors of the University of Western Ontario, (Respondent).

Unit: "all security officers employed by the University of Western Ontario, in its Security & Traffic Services section of the Physical Plant Department, London Campus, London, Ontario, save and except Sergeant, persons above the rank of Sergeant, office staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school or university vacation period". (18 employees in unit). (*Having regard to the agreement of the parties*).

1122-81-R: United Brotherhood of Carpenters and Joiners of America Local 1190, (Applicant) v. C.O.B. National Carpentry, (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in the County of Ontario (except the Townships of Pickering, Rama and Mara) and the County of Durham (except the Township of Hope), excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman". (8 employees in unit).

1123-81-R: United Brotherhood of Carpenters and Joiners of America, Local 1190, (Applicant) v. Arrow Carpentry (Scarborough) Limited, (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in the County of Ontario (except the Townships of Pickering, Rama and Mara) and the County of Durham (except the Township of Hope), excluding the industrial, commercial and institutional sectors, save and except non-working foremen and persons above the rank of non-working foreman". (20 employees in unit).

1124-81-R: Graphic Arts International Union, Local 211 Toronto, Ontario, (Applicant) v. Colour Print Graphics, (Respondent).

Unit: "all employees of the respondent in Metropolitan Toronto, save and except non-working foremen, persons above the rank of non-working foreman, office and clerical staff". (4 employees in unit).

1128-81-R: United Food and Commercial Workers International Union, Local 175, (Applicant) v. Trophy Nuts Limited, (Respondent).

Unit: "all employees of the respondent at its plant in Bramalea, Ontario, save and except assistant plant managers, persons above the rank of assistant plant manager, office and sales staff, persons a regularly employed for not more than 24 hours per week and students employed during the school vacation period". (23 employees in unit). (*Having regard to the agreement of the parties*).

1133-81-R: International Union of Operating Engineers, Local 793, (Applicant) v. IDA Development Ltd., (Respondent).

Unit: "all employees of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all employees of the respondent in all other sectors in the District of Kenora, including the Patricia portion, engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing and amintaining of same, save and except non-working foremen and persons above the rank of non-working foreman". (3 employees in unit).

1137-81-R: Labourers' International Union of North America, Local 183, (Applicant) v. Peel Paving Ltd., (Industrial, Commercial and Asphalt Paving Repairs), (Respondent).

Unit: “all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all construction labourers in the employ of the respondent in all other sectors in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the county of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman”. (4 employees in unit).

1139-81-R: United Brotherhood of Carpenters and Joiners of America Local 1190, (Applicant) v. Joseph Schmidt Carpentry Limited, (Respondent).

Unit: “all carpenters and carpenters’ apprentices in the employ of the respondent in Metropolitan Toronto, The Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman”. (28 employees in unit).

1140-81-R: Teamsters Union Local 938, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. Muir’s Cartage Limited, (Respondent) v. Group of Employees, (Objectors).

Unit: “all employees of the respondent in Metropolitan Toronto, save and except dispatchers and supervisors, persons above the rank of dispatcher and supervisor, office, clerical and sales staff, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period”. (34 employees in unit). (*Having regard to the agreement of the parties*).

1142-81-R: Labourers’ International Union of North America, Local 183, (Applicant) v. Porter Precision Products Canada Ltd., (Respondent) v. Group of Employees, (Objectors).

Unit: “all employees of the respondent employed in Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, office sales and clerical staff, persons regularly employed for not more than 24 hours per week, and students employed during the school vacation period”. (21 employees in unit). (*Having regard to the agreement of the parties*).

1171-81-R: Service Employees Union, Local 204, affiliated with A.F. OF L., C.I.O., C.L.C., (Applicant) v. K Mart Canada Limited, (Respondent) v. Group of Employees, (Objectors).

Unit: “all employees of the respondent employed at Shoppers World — Albion Mall, in the Municipality of Etobicoke, Ontario, save and except department managers, persons above the rank of department manager, management trainees, pharmacists, persons regularly employed for not more than twenty-four hours per week, and students employed during the school vacation period”. (65 employees in unit). (*Having regard to the agreement of the parties*).

1174-81-R: Ontario Nurses Association, (Applicant) v. York County Hospital Corporation, (Respondent).

Unit: “all registered and graduate nurses of the respondent regularly employed in a nursing capacity for no more than 24 hours per week, save and except head nurses and persons above the rank of head nurse”. (161 employees in unit). (*Having regard to the agreement of the parties*).

1177-81-R: International Brotherhood of Painters and Allied Trades — Local Union 1891, (Applicant) v. Ital-Latin Painting, (Respondent).

Unit: “all painters and painters’ apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all painters and painters’ apprentices in the employ of the respondent in all other sectors in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the

Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman". (3 employees in unit).

1180-81-R: United Electrical, Radio and Machine Workers of America (UE), (Applicant) v. W. D. Bray Rivet & Machine Company Ltd., (Respondent).

Unit: "all employees of the respondent at Gananoque, save and except foremen, persons above the rank of foreman, office and sales staff". (40 employees in unit). (*Having regard to the agreement of the parties*).

1196-81-R: Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftsmen-Local 12, Kitchener, Ontario, (Applicant) v. Transcedar Limited, (Respondent).

Unit: "all bricklayers and bricklayers' apprentices, stonemasons and stonemasons' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all bricklayers and bricklayers' apprentices, stonemasons and stonemasons' apprentices in the employ of the respondent in all other sectors in the Regional Municipality of Waterloo except part of Beverly Township annexed by North Dumbries Township, save and except non-working foremen and persons above the rank of non-working foreman". (2 employees in unit).

1198-81-R: Graphic Arts International Union, Local 28-B, (Applicant) v. Noble Scott Co. Ltd., (Respondent).

Unit: "all employees of the company in Metropolitan Toronto, save and except foremen and forelades, persons above the rank of foreman and forelady, office and sales staff, employees covered by subsisting collective agreements, persons regularly employed for not more than 24 hours per week and students employed during their school vacation period". (2 employees in unit). (*Having regard to the agreement of the parties*).

1205-81-R: Labourers' International Union of North America, Local 183, (Applicant) v. Carlo Carpentry Contracting Ltd., (Respondent).

Unit: "all carpenters, carpenters' apprentices and construction labourers in the employ of the respondent in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman". (3 employees in unit). (*Having regard to the agreement of the parties*).

1208-81-R: Canadian Union of Public Employees, (Applicant) v. Comhold Investments Limited, carrying on business as Harborne Nursing Home, (Respondent).

Unit: "all employees of the respondent at Lakefield, Ontario, save and except registered nurses, graduate nurses, undergraduate nurses, office and clerical staff, supervisors and persons above the rank of supervisor". (16 employees in unit). (*Having regard to the agreement of the parties*).

1209-81-R: Retail, Commercial and Industrial Union, Local 206, Chartered by the United Food & Commercial Workers International Union, C.L.C., A.F.L., C.I.O., (Applicant) v. S. B. Sitka Drugs Limited, (Respondent).

Unit: "all employees of the respondent in Barrie, save and except graduate and undergraduate pharmacists and persons above the rank of graduate and undergraduate pharmacists". (24 employees in unit). (*Having regard to the agreement of the parties*).

1227-81-R: United Steelworkers of America, (Applicant) v. DAF Indal Ltd., (Respondent).

Unit: "all employees of the respondent in the City of Mississauga, save and except supervisors, foremen, persons above the rank of supervisor-foreman, office, sales, clerical, technical and quality assurance staff, professional engineers, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period". (61 employees in unit). (*Having regard to the agreement of the parties*).

1232-81-R: Labourers' International Union of North America, Local 183, (Applicant) v. York Condominium Corporation No. 255, (Respondent).

Unit: "all employees of the respondent engaged in cleaning and maintenance at 75 Emmett Avenue, Toronto, Ontario, (The Winston House), including resident superintendents, save and except property manager, office and clerical staff". (4 employees in unit). (*Having regard to the agreement of the parties*).

41243-81-R: Labourers' International Union of North America, Local 183, (Applicant) v. Rafael Munoz Carpenter, (Respondent).

Unit: "all carpenters, carpenters' apprentices and construction labourers in the employ of the respondent in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Town of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, excluding the industrial, commercial and institutional sectors, save and except non-working foremen and persons above the rank of non-working foreman". (5 employees in unit). (*Having regard to the agreement of the parties*).

1244-81-R: Labourers' International Union of North America, Local 183, (Applicant) v. Turrer Construction Ltd., (Respondent).

Unit: "all carpenters, carpenters' apprentices and construction labourers in the employ of the respondent in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township Pickering in the County of Ontario, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above in unit). (*Having regard to the agreement of the parties*).

1246-81-R: Health, Office, and Professional Employees, Local 1976, Chartered by the United Food & Commercial Workers International Union, C.L.C., A.F.L., C.I.O., (Applicant) v. Coleman Health Care Centre, (Respondent).

Unit: "all registered and graduate nurses employed in a nursing capacity by the respondent at Barrie, Ontario, save and except the director of nursing and persons above the rank of director of nursing". (8 employees in unit). (*Having regard to the agreement of the parties*).

1247-81-R: United Food and Commercial Workers International Union, (Applicant) v. Weetabix of Canada (Mfg.) Limited, (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent at Cobourg, Ontario, save and except forepersons, persons above the rank of foreperson, office and sales staff, laboratory and quality control technicians, salaried senior maintenance technicians, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period". (30 employees in unit). (*Having regard to the agreement of the parties*).

1249-81-R: Health, Office and Professional Employees, Local 1976, Chartered by the United Food & Commercial Workers International Union, C.L.C., A.F.L., C.I.O., (Applicant) v. Coleman Health Care Centre, (Respondent).

Unit: "all employees of the respondent at Barrie, Ontario, save and except supervisors, persons above the rank of supervisor, office staff and registered nurses". (73 employees in unit). (*Having regard to the agreement of the parties*).

1254-81-R: Teamsters, Chauffeurs, Warehousemen and Helpers Local Union No. 880, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. Nelson Wood Products (1978) Limited, (Respondent).

Unit: "all employees of the respondent at Wheatley, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period". (41 employees in unit). (*Having regard to the agreement of the parties*).

1259-81-R: International Union of Operating Engineers, Local 793, (Applicant) v. Shaw Pipe Protection Limited, (Respondent).

Unit: "all employees of the respondent at Welland, Ontario, save and except foremen, persons above the rank of foreman, sales, office and clerical staff". (46 employees in unit). (*Having regard to the agreement of the parties*).

1260-81-R: Canadian Union of Operating Engineers and General Workers, (Applicant) v. M & O Bus Lines (Handicab) Limited, (Respondent).

Unit: "all employees of the respondent at Nepean, Ontario, save and except supervisor, persons above the rank of supervisor, office and clerical staff, maintenance workers and mechanics and persons regularly employed for not more than 24 hours per week". (26 employees in unit). (*Having regard to the agreement of the parties*).

1272-81-R: Retail, Wholesale and Department Store Union, AFL:CIO:CLC:, (Applicant) v. General Bakeries Limited, (Respondent).

Unit: "all office and clerical employees of the respondent in the City of Kingston, save and except plant accountant, persons above the rank of plant accountant, persons regularly employed for not more than 24 hours per week, students employed during the school vacation period and those covered by subsisting collective agreements". (10 employees in unit). (*Having regard to the agreement of the parties*).

1281-81-R: Labourers' International Union of North America, Local 183, (Applicant) v. Africa Carpentry, (Respondent).

Unit: "all carpenters, carpenters' apprentices and construction labourers in the employ of the respondent in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foremen". (2 employees in unit). (*Having regard to the agreement of the parties*).

1282-81-R: Labourers' International Union of North America, Local 183, (Applicant) v. Borean Carpentry Ltd., (Respondent).

Unit: "all carpenters, carpenters' apprentices and construction labourers in the employ of the respondent in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman". (3 employees in unit). (*Having regard to the agreement of the parties*).

1284-81-R: Ontario Public Service Employees Union, (Applicant) v. Hastings and Prince Edward Legal Services, (Respondent).

Unit: "all employees of the respondent employed at Belleville, Ontario, save and except Director and those above the rank of Director". (3 employees in unit). (*Having regard to the agreement of the parties*).

Bargaining Agents Certified Subsequent to a Pre-Hearing Vote

2563-80-R: International Woodworkers of America, (Applicant) v. Upper Canadian Furniture Limited, (Respondent).

Unit: "all employees of the respondent at Guelph, Ontario, save and except foreman, persons above the rank of foremen, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the vacation period". (53 employees in unit). (*Having regard to the agreement of the parties*).

Number of persons on voters' list at start of vote		52
Number of persons who cast ballots		47
Number of ballots marked in favour of applicant	20	
Number of ballots marked against applicant	27	

0768-81-R: Canadian Paperworkers Union, (Applicant) v. Cameron Packaging Limited, (Respondent).

Unit: "all employees of the respondent in Markham, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff, students employed during the school vacation period and persons regularly employed for not more than twenty-four (24) hours per week". (31 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on list as originally prepared by employer		31
Number of persons who cast ballots		28
Number of ballots excluding segregated ballots cast by persons whose names appear on voters' list	27	
Number of ballots marked in favour of applicant	17	
Number of ballots marked against applicant	10	
Ballots segregated and not counted	1	

0994-81-R: Canadian Paperworkers Union, (Applicant) v. Coles Book Stores Limited, (Respondent) v. International Union of Allied, Novelty and Production Workers, Local 950 (Formerly — International Union of Doll and Toy Workers of the United States & Canada, Local 905), (Intervener).

Unit: "all employees of the respondent at its warehouse in the Municipality of Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, office and sales staff, students employed during the school vacation period and persons regularly employed for not more than twenty-four (24) hours per week". (49 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters' list		39
Number of persons who cast ballots		34
Number of spoiled ballots	1	
Number of ballots marked in favour of applicant	25	
Number of ballots marked in favour of intervener	8	

0997-81-R: Energy and Chemical Workers Union, (Applicant) v. Connaught Laboratories Limited, (Respondent) v. International Union of Operating Engineers Local 796, (Intervener #1) v. Connaught Laboratories Employees Association, (Intervener #2).

Unit: "all employees of the respondent employed at Connaught Laboratories Limited in Toronto and at Bolton, save and except persons at or above the rank of senior supervisors or research assistants, secretaries to persons at or above the level of director, secretary to the comptroller; accountant, systems analyst-programmer, persons employed in the personnel and payroll offices, sales representatives; persons covered by existing collective agreements, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period". (540 employees in unit). (*Clarity note*).

Bargaining Agents Certified Subsequent to a Post-Hearing Vote

0823-81-R: Retail, Commercial and Industrial Union Local 206 Chartered by the United Food & Commercial Workers International Union, C.L.C., A.F.L., C.I.O., (Applicant) v. Fabricland Distributors Limited, (Respondent).

Unit: "all employees of the respondent at Guelph, Ontario save and except Store Manager, persons above the rank of store manager, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period". (2 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on list as originally prepared by employer		2
Number of persons who cast ballots	2	
Number of ballots marked in favour of applicant	2	
Number of ballots marked against applicant	0	

0846-81-R: Commercial Workers Union Local 486, (Applicant) v. Fabricland Distributors, (Respondent).

Unit: "all employees of the respondent at Kingston, Ontario regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except store managers and persons above the rank of store manager". (6 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters' list		4
Number of persons who cast ballots	3	
Number of ballots marked in favour of applicant	3	
Number of ballots marked against applicant	0	

0872-81-R: Spar Professional and Allied Technical Employees Association, (Applicant) v. Spar Aerospace Limited, (Respondent).

Unit: "all employees of the respondent employed as professional engineers, engineers, engineers in training, scientists and allied technical employees at Shirley Bay, Ontario, save and except employees reporting directly to Vice-Presidents; supervisors, foremen, managers and assistant programme managers; those above the rank of supervisor, foreman, manager and assistant programme manager; persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period". (24) employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters' list		25
Number of persons who cast ballots	22	
Number of ballots marked in favour of applicant	20	
Number of ballots marked against applicant	2	

1016-81-R: The Ontario New Democratic Party Caucus Workers' Union (ONDPCWU), (Applicant) v. Ontario New Democratic Party Caucus, (Respondent) v. Office & Professional Employees International Union, L. 343, (Intervener).

Unit: "all employees of the Ontario New Democratic Party Caucus employed at the Caucus' Toronto offices, save and except the office manager, research director, and executive assistant to the leader of the party". (59 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters' list		45
Number of persons who cast ballots	32	
Number of ballots marked in favour of applicant	29	
Number of ballots marked in favour of intervener	3	

APPLICATIONS FOR CERTIFICATION DISMISSED

No Vote Conducted

1917-79-R: United Cement Lime & Gypsum Workers International Union, (Applicant) v. Par-Tex Engineering and Contracting Co. Limited, (Respondent) v. Labourers' International Union of North America, Ontario Provincial District Council and its Affiliated Local Union, Labourers' International Union of North America, Local 183, (Intervener).

2031-79-R: United Cement Lime & Gypsum Workers International Union, (Applicant) v. American Construction Company, (Respondent) v. The Teamsters Local Union Number 230, Ready Mix, Building Supply, Hydro and Construction Drivers, Warehousemen and Helpers of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Intervener).

2215-79-R: Ready Mix Building Supply, Hydro and Construction Drivers, Local 230 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. Rumble Contracting Ltd., (Respondent) v. United Cement, Lime & Gypsum Workers International Union, (Intervener).

2230-79-R: United Cement Lime & Gypsum Workers International Union (Applicant) v. Valentine Enterprises Contracting, (Respondent) v. Labourers' International Union of North America, Local 183, (Intervener).

2307-79-R: United Cement Lime & Gypsum Workers International Union, (Applicant) v. Alsi Construction Ltd., (Respondent) v. Ready Mix Building Supply, Hydro and Construction Drivers, Local 230 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Intervener).

2374-79-R: United Cement Lime & Gypsum Workers International Union, (Applicant) v. Alcan-Colony Contracting Co. Limited, (Respondent).

2392-79-R: United Cement Lime & Gypsum Workers International Union, (Applicant) v. Val.-Dal Construction Ltd., (Respondent) v. Labourers' International Union of North America, Local 183, (Intervener).

2436-79-R: United Cement Lime & Gypsum Workers International Union, (Applicant) v. Maple Earth Moving Company, (Respondent) v. Teamsters Local Union Number 230, Ready Mix, Building Supply, Hydro and Construction Drivers, Warehousemen and Helpers, of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America, (Intervener).

0165-80-R: United Cement Lime & Gypsum Workers International Union, (Applicant) v. King Cross Contracting Ltd., (Respondent) v. Teamsters Local Union Number 230, Ready Mix, Building Supply, Hydro and Construction Drivers, Warehousemen and Helpers of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Intervener).

0166-80-R: United Cement Lime & Gypsum Workers International Union, (Applicant) v. Roseway Construction Ltd., (Respondent) v. Teamsters Local Union Number 230, Ready Mix, Building Supply, Hydro and Construction Drivers, Warehousemen and Helpers of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Intervener).

0207-80-R: United Cement Lime & Gypsum Workers International Union, (Applicant) v. Clearway Construction Ltd., (Respondent) v. Teamsters Local Union Number 230, Ready Mix, Building Supply, Hydro and Construction Drivers, Warehousemen and Helpers of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Intervener).

0449-80-R: United Cement Lime & Gypsum Workers International Union, (Applicant) v. Badner Engineering Ltd., (Respondent) v. Teamsters Local Union Number 230, Ready Mix, Building Supply, Hydro and Construction Drivers, Warehousemen and Helpers of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Intervener).

0466-80-R: United Cement Lime & Gypsum Workers International Union, (Applicant) v. D'Orazio Excavating Contractors Ltd., (Respondent) v. Teamsters Local Union Number 230, Ready Building Supply, Hydro and Construction Drivers, Warehousemen and Helpers of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Intervener).

0537-80-R: United Cement Lime & Gypsum Workers International Union, (Applicant) v. Lanterna Homes, (Respondent).

0538-80-R: United Cement Lime & Gypsum Workers International Union, (Applicant) v. Academy Consolidated Development Inc., (Respondent).

0606-80-R: United Cement Lime & Gypsum Workers International Union, (Applicant) v. Gottardo Bros. Excavating, (Respondent).

0615-80-R: United Cement Lime & Gypsum Workers International Union, (Applicant) v. Pilen Construction of Canada Ltd., (Respondent) v. Teamsters Local Union Number 230, Ready Mix, Building Supply Hydro and Construction Drivers, Warehousemen and Helpers of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Intervener).

0732-80-R: United Cement Lime & Gypsum Workers International Union, (Applicant) v. Bot Construction Limited, (Respondent).

1021-80-R: United Cement Lime & Gypsum Workers International Union, (Applicant) v. Petrex Construction Limited, (Respondent).

2584-80-R: The Canadian Union of Public Employees, (Applicant) v. The Essex County Board Education, (Respondent).

0484-81-R: Labourers' International Union of North America, Local 183 (Applicant) v. Bathurst & Prue Developments Ltd., (Respondent).

0936-81-R: United Brotherhood of Carpenters and Joiners of America Local 1190, (Applicant) v. Neil Vivian Carpenter Contracting, (Respondent).

0946-81-R: Retail, Wholesale and Department Store Union, AFL:CIO:CLC:, (Applicant) v. Cambrian Maintenance of Sudbury Limited, (Respondent).

0964-81-R: Southern Ontario Newspaper Guild, Local 87 The Newspaper Guild, (AFL-CIO-CLC), (Applicant) v. The Toronto Stock Exchange, (Respondent).

1065-81-R: United Brotherhood of Carpenters and Joiners of America Local 1190, (Applicant) v. Centennial Carpentry Limited, (Respondent).

1099-81-R: Ottawa Printing and Graphics Communications Union, Local Number N62, (Applicant) v. The Citizen, a Division of Southam Press Inc., (Respondent).

1106-81-R: United Brotherhood of Carpenters and Joiners of America Local 1190, (Applicant) v. F. and Z. Carpentry, (Respondent).

1147-81-R: Canadian Paperworkers Union, (Applicant) v. Lecours Lumber Co. Ltd., (Respondent) v. Lumber and Sawmill Workers Union, Local 2995, of the United Brotherhood of Carpenters and Joiners of America, (Intervener).

1229-81-R: Labourers' International Union of North America, Local 1059, (Applicant) v. Val-Ros Construction, (Respondent).

Applications for Certification Dismissed Subsequent to a Pre-Hearing Vote

2718-80-R: Service Employees Union, Local 204 affiliated with the A.F. OF L., C.I.O., C.L.C., (Applicant) v. Bestview Holdings Limited and Bestview Services Limited, (Respondent) v. Christian Labour Association, (Intervener).

Unit: "all employees of the respondent working at 77 Main Street in the Borough of East York, Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, and casual employees who regularly work less than five hours in any one day and not more than fifteen hours in any one week". (43 employees in unit).

Number of names of persons on revised voters' list	71
Number of persons who cast ballots	50
Number of ballots excluding segregated ballots cast by persons whose names appear on voters' list	50

0132-81-R: International Association of Machinists and Aerospace Workers, A.F.L., C.I.O., C.L.C., (Applicant) v. International Vacations Limited, (Respondent).

Unit #1: "all office, clerical and sales employees of the respondent working at or out of Mississauga, Ontario, save and except supervisors, persons above the rank of supervisor, secretaries to the Reservations Manager, Director of Financial Operations, Director of Commercial Sales, Director of Passenger Sales, Vice President, Marketing, data centre employees, those persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period". (162 employees in unit). (*Having regard to the agreement of the parties*).

Unit #2: "all office, clerical and sales employees of the respondent regularly employed for not more than twenty-four hours per week and students employed during the school vacation period working at or out of Mississauga, Ontario, save and except supervisors, persons above the rank of supervisor, secretaries to the Reservations Manager, Director of Financial Operations, Director of Commercial Sales, Director of Passenger Sales, Vice President, Marketing, and data centre employees". (58 employees in unit). (*Having regard to the agreement of the parties*).

Unit #1

Number of names of persons on list as originally prepared by employer	165
Number of persons who cast ballots	147
Number of ballots excluding segregated ballots cast by persons whose names appear on voters' list	106
Number of segregated ballots cast by persons whose name appear on voters' list	40
Number of segregated ballots cast by persons whose names do not appear on voters' list	1

Unit #2

Number of names of persons on list as originally prepared by employer	57
Number of persons who cast ballots	44

Number of ballots excluding segregated ballots cast by persons whose names appear on voters' list	21
Number of segregated ballots cast by persons whose name appear on voters' list	22
Number of segregated ballots cast by persons whose names do not appear on voters' list	1

0766-81-R: Canadian Paperworkers Union, (Applicant) v. Newaygo Forest Products Limited, (Respondent) v. Lumber and Sawmill Workers Union Local 2995 of the United Brotherhood of Carpenters and Joiners of America, (Intervener).

Unit: "all employees of the respondent working in its sawmill, planing mill and yard operations at Mead, Ontario, save and except foremen, persons above the rank of foreman, sales and office staff and persons covered by substituting collective agreements". (147 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters' list	157
Number of persons who cast ballots	118
Number of ballots marked in favour of applicant	47
Number of ballots marked in favour of intervener	70
Ballots segregated and not counted	1

0839-81-R: Retail, Wholesale and Department Store Union, AFL:CIO:CLC., (Applicant) v. Black & Decker Canada Inc., (Respondent).

Unit: "all employees of the respondent at Brockville, Ontario, save and except foremen, persons above the rank of foreman, office and clerical staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period". (769 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on list as originally prepared by employer	768
Number of persons who cast ballots	742
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	210
Number of ballots marked against applicant	523
Ballots segregated and not counted	8

0976-81-R: Canadian Union of United Brewery, Four, Cereal, Soft Drink and Distillery Workers, Local 304, (Applicant) v. Labatt's Ontario Breweries Division of Labatt Brewing Company Limited, (Respondent).

Unit: "all office, clerical and technical employees of the Respondent in the Municipality of Metropolitan Toronto, save and except supervisors, persons above the rank of supervisors, sales staff, persons employed in a confidential capacity with respect to labour relations, persons covered by a subsisting collective agreement between the Applicant and the Respondent, students employed during the school vacation periods or under co-operative training programs, and persons regularly employed for not more than twenty-four hours per week". (56 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on list as originally prepared by employer	50
Number of persons who cast ballots	47
Number of ballots marked in favour of applicant	15
Number of ballots marked against applicant	31
Ballots segregated and not counted	1

Applications for Certification Dismissed Subsequent to a Post-Hearing Vote

0169-81-R: Labourers' International Union of North America, Local 183, (Applicant) v. Lamco Construction Ltd., (Respondent).

Unit: "all construction labourers in the employ of the respondent in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, excluding the industrial, commercial and institutional sectors, save and except non-working foremen and persons above the rank of non-working foreman". (9 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on list as originally prepared by employer		29
Number of persons who cast ballots	27	
Number of ballots marked in favour of applicant	5	
Number of ballots marked against applicant	22	

0561-81-R: International Union, United Automobile, Aerospace & Agricultural Implement Workers of America (U.A.W.), (Applicant) v. Gabriel of Canada Limited — Ingersoll Plant, (Respondent) v. United Steelworkers of America, (Intervener).

Unit: "all employees of the respondent in the Town of Ingersoll, Ontario save and except supervisors, persons above the rank of supervisors, office and sales staff, plant production inventory control person, technical engineering and professional employees and security guards". (53 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters' list		83
Number of persons who cast ballots	81	
Number of ballots marked in favour of applicant	39	
Number of ballots marked against applicant	42	

0672-81-R: Retail, Clerks Union, Local 409, (Applicant) v. Farelane Properties Ltd., (Respondent).

Unit 3#1: "all employees of the respondent in its petroleum service station at Dryden, Ontario, save and except service station manager, office manager, and those above those ranks". (15 employees in unit). (*Having regard to the agreement of the parties*).

Unit #2: "all employees of the respondent at its Husky House restaurant in Dryden, Ontario, save and except the restaurant manager, office manager and those above those ranks". (27 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters' list		28
Number of persons who cast ballots	23	
Number of ballots marked in favour of applicant	10	
Number of ballots marked against applicant	13	

0720-81-R: Toronto Typographical Union No. 91 (ITU), (Applicant) v. Sherville-Dickson Limited, (Respondent).

Unit: "all employees of the respondent in the Municipality of Toronto engaged in composing room work, save and except non-working foremen, persons above the rank of non-working foreman". (23 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on list as originally prepared by employer		22
Number of persons who cast ballots	20	
Number of ballots marked in favour of applicant	8	
Number of ballots marked against applicant	12	

0730-81-R: Retail, Wholesale and Department Store Union, AFL, CIO, CLC, (Applicant) v. Canada Dry Limited, (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent at Kingston, Ontario, save and except manager, persons above the rank of manager, office staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period". (12 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on list as originally prepared by employer		11
Number of persons who cast ballots	11	
Number of ballots marked in favour of applicant	3	
Number of ballots marked against applicant	8	

0929-81-R: United Brotherhood of Carpenters and Joiners of America Local 2679, (Applicant) v. Rockett Lumber & Building Supplies Limited, (Respondent) v. Group of Employees, (Objectors).

Unit "all employees of the respondent employed at Mississauga, save and except foremen, persons above the rank of foreman, office and sales staff". (83 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters' list		73
Number of persons who cast ballots	69	
Number of ballots marked in favour of applicant	30	
Number of ballots marked against applicant	34	
Ballots segregated and not counted	5	

APPLICATIONS FOR CERTIFICATIONS WITHDRAWN

0915-81-R: United Steelworkers of America, (Applicant) v. Lindsay Steel Fabricating Limited, (Respondent).

0944-81-R: Canadian Union of Public Employees, (Applicant) v. Queen's University at Kingston, Ontario, (Respondent) v. Queen's University Staff Association, (Intervener) v. Group of Employees, (Objectors).

1013-81-R: United Brotherhood of Carpenters and Joiners of America Local 1190, (Applicant) v. Bill Hume Contractor, (Respondent).

1031-81-R: United Brotherhood of Carpenters and Joiners of America Local 1190, (Applicant) v. D. L. Carpentry, (Respondent). v. Labourers' International Union of North America, Local 183, (Intervener).

1072-81-R: Ontario Public Service Employees Union, (Applicant) v. Coleman Health Care Centre, (Respondent) v. Health, Office & Professional Employees Union Local 1976, Chartered by the United Food & Commercial Workers, C.L.C., A.F.L., C.I.O., (Intervener).

1100-81-R: Amalgamated Clothing & Textile Workers Union, AFL, CIO, CLC, (Applicant) v. Vagden Mills Limited, (Respondent).

1218-81-R: Labourers' International Union of North America, Local 1059, (Applicant) v. Thor B. & O. Ltd., (Respondent).

1332-81-R: Labourers' International Union of North America, Local 506, (Applicant) v. Industrial Acoustics Co. Ltd., (Respondent).

APPLICATIONS FOR DECLARATION TERMINATING BARGAINING RIGHTS

1653-80-R: Peter Muscat and a Group of Employees, (Applicant) v. United Food and Commercial Workers International Union, Local P287, (Respondent) v. Beef Terminal (1979) Limited, (Intervener).

Unit: "all employees of the respondent on the list agreed to by the parties". (43 employees in unit). (*Granted*).

Number of names of persons on revised voters' list		43
Number of persons who cast ballots		26
Number of ballots marked in favour of respondent	5	
Number of ballots marked against respondent	21	

0405-81-R: Patricia Morgan, (Applicant) v. Oil & Gas Technician, Service, Domestic and General Workers Union Local 1267, L.I.U.N.A., (Respondent) v. Gilson Bros. (Canada) Ltd., (Intervener). (*Dismissed*).

0833-81-R: Thomas A. Johnston, (Applicant) v. Local 1979, Industrial Division, Retail, Clerks International Union CLC, AFL-CIO, (Respondent) v. Wilson Automotive (owned and operated by the Machine Shop (Belleville) Ltd.), (Intervener). (*Granted*).

1145-81-R: Linda Barnes and Employees of Broiler Factory, and Prime Rib Place, Maple Leaf Village Niagara Falls, Ont., (Applicant) v. Hotel, Motel & Restaurant Employees Union, Local 442, (Respondent) v. Maple Leaf Village Investments, (Intervener).

Unit: #1: "all employees of K.V.B. Ltd., c.o.b. as A La Crepe Bretonne, at Niagara Falls, Ontario, save and except assistant manager, persons above the rank of assistant manager, chief crepiere, hostesses, office staff, students employed during the school vacation period and persons regularly employed for not more than twenty-four hours per week. (66 employees in unit).

Unit #2: "Students employed during the school vacation period and employees regularly employed for not more than twenty-four hours per week by K.V.B. Ltd. c.o.b. as A La Crepe Bretonne, at Niagara Falls, Ontario, save and except assistant manager, persons above the rank of assistant manager, chief crepiere, hostesses and office staff". (2 employees in unit). (*Granted*).

1146-81-R: Randy Beamish (on behalf of the Employees of Heritage Stove Comp.), (Applicant) v. The United Steel Workers of America, (Respondent). (*Dismissed*).

APPLICATIONS FOR DECLARATION OF UNLAWFUL STRIKE

0838-81-U: Ivaco Rolling Mills, A Division of Ivaco Inc., (Applicant) v. The bargaining-unit employees of Ivaco Rolling Mills, a Division of Ivaco Inc., as set out on the list contained in Schedule A to the application, (Respondents). (*Granted*).

1136-81-U: Cornwall Spinners Ltd., (Applicant) v. Amalgamated Clothing and Textile Workers Union, AFL-CIO-CLC, Hazel Bell Craig et al (See Schedule "A and B" attached hereto), (Respondents). (*Granted*).

1285-81-U: Thunder Bay Symphony Orchestra Association Inc., (Applicant) v. The Thunder Bay Musicians Protective Association, and Local 591 of The American Federation of Musicians, and Roy Coran, Jim Watts, Norman Slongo, Doug Stock, J. Alan Wood, and See Schedule "A" attached. (Respondents). (*Withdrawn*).

APPLICATIONS FOR DECLARATION OF UNLAWFUL STRIKE (CONSTRUCTION INDUSTRY)

1178-81-U: Tamarron Group Inc., (Applicant) v. See employees named on Schedule "A" attached representing themselves and all other members of the United Brotherhood of Carpenters and Joiners of America and The United Brotherhood of Carpenters and Joiners of America and Local 1669 of the said Union, (Respondents). (*Withdrawn*).

APPLICATIONS FOR CONSENT TO PROSECUTE

1226-81-U: Canac Kitchens Limited, (Applicant) v. Peter Dorfman and Canadian Union of Industrial Employees, (Respondents). (*Withdrawn*).

COMPLAINTS OF UNFAIR LABOUR PRACTICE

2295-80-U: The International Union, United Automobile, Aerospace & Agricultural Implement Workers of America and its Local 112, (Complainant) v. DeHavilland Aircraft of Canada Limited, (Respondent). (*Dismissed*).

2381-80-U: Service Employees' Union, Local 183, (Complainant) v. Mary Brown's Fried Chicken, (Respondent). (*Withdrawn*).

2425-80-U: United Steelworkers of America, (Complainant) v. Sling-Choker Manufacturing Limited, (Respondent). (*Granted*).

2645-80-U: International Woodworkers of America, (Complainant) v. Upper Canadian Furniture Limited, (Respondent). (*Granted*).

0076-81-U: International Union of Operating Engineers, Local 793, (Complainant) v. The Corporation of the Town of Meaford, (Respondent). (*Granted*).

0254-81-U: W. Millben, W. Osborne, M. Fields, R. Desbien, B. Segee, L. Powers, T. Goddard, (Complainants) v. Ontario Taxi Association 1688 Canadian Labour Congress and its members L. Laham, S. Wier, R. St. Jacques, D. Boughner, (Respondents). (*Granted*).

0597-81-U: New Generation Homes, (Complainant) v. Labourers' International Union of North America, Local 183 and Lou Costaldo, (Respondents). (*Withdrawn*).

0750-81-U: United Food and Commercial Workers Union Local 1000A, (Complainant) v. Cara Operations Limited (air Terminals Restaurant Division), (Respondent) v. Hotel, Restaurant and Cafeteria Employees Union, Local 75, (Intervener). (*Withdrawn*).

0751-81-U: United Food and Commercial Workers Union Local 1000A, (Complainant) v. Cara Operations Limited (Air Terminals Restaurant Divisions), (Respondent) v. Hotel, Restaurant and Cafeteria Employees Union, Local 75, (Intervener). (*Withdrawn*).

0784-81-U: United Food and Commercial Workers Union Local 1000A, (Complainant) v. Cara Operations Limited (Air Terminals Restaurant Division), (Respondent) v. Hotel, Restaurant and Cafeteria Employees Union, Local 75, (Intervener). (*Withdrawn*).

0785-81-U: United Food and Commercial Workers Union Local 1000A, (Complainant) v. Cara Operations Limited (air Terminals Restaurant Division), (Respondent) v. Hotel, Restaurant and Cafeteria Employees Union, Local 75, (Intervener). (*Withdrawn*).

0862-81-U: United Food and Commercial Workers Union Local 1000A, (Complainant) v. Cara Operations Limited (Air Terminals Restaurant Division), (Respondent) v. Hotel, Restaurant and Cafeteria Employees Union, Local 75, (Intervener). (*Withdrawn*).

0863-81-U: United Food and Commercial Workers Union, Local 1000A, (Complainant) v. Cara Operations Limited (Air Terminals Restaurant Division), (Respondent) v. Hotel, Restaurant and Cafeteria Employees Union, Local 75, (Intervener). (*Withdrawn*).

0933-81-U: Union of Bank Employees Local 2104 (Ontario) C.L.C., (Complainant) v. Airline (Malton) Credit Union Limited, (Respondent). (*Dismissed*).

0951-81-U: Karen Campbell, (Complainant) v. K-Mart Canada Ltd., Bayview Village, (Respondent). (*Withdrawn*).

0965-81-U: United Food & Commercial Workers (H.O.P.E.), (Complainant) v. Brewers Nursing Home, (Respondent). (*Withdrawn*).

0981-81-U: International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmith, Foregers and Helpers, Local 210, (Complainant) v. Eskerod Signs Limited and Gary Eskerod, (Respondents). (*Withdrawn*).

0992-81-U: United Steelworkers of America, (Complainant) v. Tru-View Aluminum Products, (Respondent). (*Withdrawn*).

1003-81-U: United Rubber, Cork, Linoleum and Plastic Workers of America, AFL-CIO-CLC, (Complainant) v. Wegu Canada Incorporated, (Respondent). (*Withdrawn*).

1018-81-U: Kevin Gerard Dunphy, (Complainant) v. Canadian Union of Restaurant and Related Employees, (Respondent). (*Withdrawn*).

1081-81-U: Teamsters, Chauffeurs, Warehousemen and Helpers Local Union No. 91, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Complainant) v. M. Loeb Limited, (Respondent). (*Withdrawn*).

1101-81-U: Ready-Mix, Building Supply, Hydro & Construction Drivers, Warehousemen and Helpers Local 230, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Complainant) v. Mississauga Concrete Supply Ltd., (Respondent). (*Withdrawn*).

1135-81-U: Peter George, (Complainant) v. Babcock & Wilcox Canada Ltd., United Steelworkers of America Local 2859, (Respondents). (*Withdrawn*).

1138-81-U: United Food and Commercial Workers International Union, A.F.L., C.I.O., C.L.C., and United Food and Commercial Workers International Union, Local 175, (Complainants) v. Dundas I.G.A. Market, (Respondent). (*Withdrawn*).

1143-81-U: Canadian Union of Industrial Employees, (Complainant) v. Canac Kitchens, (Respondent). (*Withdrawn*).

1144-81-U: Canadian Union of Industrial Employees, (Complainant) v. Canac Kitchens, (Respondent). (*Withdrawn*).

1149-81-U: Canadian Union of United Brewery, Flour, Cereal Soft Drink and Distillery Workers, Local Union 304, (Complainant) v. Corning Canada Inc., (Respondent). (*Withdrawn*).

1183-81-U: Commercial Workers Union Local 486 chartered by the United Food and Commercial Workers International Union, (Complainant) v. La Cooperative Agricole D'Embun Ltee, (Respondent). (*Withdrawn*).

1199-81-U: United Brotherhood of Carpenters and Joiners of America, Local Union 2679, (Complainant) v. Rockett Lumber and Building Supplies Limited, (Respondent). (*Withdrawn*).

1225-81-U: Canac Kitchens Limited, (Complainant) v. Peter Dorfman and Canadian Union of Industrial Employees, (Respondents). (*Withdrawn*).

1306-81-U: International Ladies' Garment Workers' Union, (Complainant) v. York Manufacturing and Silk Screening Co., Ralph Arnold and Ada Discola, (Respondents). (*Withdrawn*).

COMPLAINTS UNDER THE OCCUPATIONAL HEALTH AND SAFETY ACT

1088-81-OH: John Duffy, (Complainant) v. Webster Manufacturing, (Respondent). (*Withdrawn*).

1296-81-OH: Local 1780 United Auto Workers Union and Wayne Doherty, (Complainants) v. Ephrim Frey and Butler Metal Products, (Respondents). (*Withdrawn*).

APPLICATIONS FOR RELIGIOUS EXEMPTION

0429-81-M: Douglas N. Butler, (Applicant) v. The York University Faculty Association, (Respondent Trade Union) v. The Board of Governors of York University, (Respondent Employer). (*Dismissed*).

APPLICATIONS FOR CONSENT TO EARLY TERMINATION OF COLLECTIVE AGREEMENT

0008-81-M: Inco Metals Company & United Steelworkers of America, (Applicant) v. Canadian Industries Limited, (Respondent). (*Terminated*).

1110-81-M: Foodcorp Limited, c.o.b. as Swiss Chalet Bar B. Q., (Employer) v. Canadian Union of Restaurant and Related Employees, (Trade Union). (*Granted*).

SALE OF A BUSINESS

0975-81-R: International Beverage Dispensers' and Bartenders' Union, Local 280, (Applicant) v. 419748 Ontario Limited and 382844 Ontario Limited, carrying on business as The Horseshoe Tavern, (Respondent). (*Granted*).

FINANCIAL STATEMENTS

0681-81-M: William Egan, (Complainant) v. International Brotherhood of Painters and Allied Trades, Local 1783, (Respondent). (*Granted*).

APPLICATIONS UNDER THE COLLEGES COLLECTIVE BARGAINING ACT SECTION 78

0139-80-U: Ontario Public Service Employees Union, (Complainant) v. The Board of Governors of The Fanshawe College of Applied Arts and Technology, J. A. Colving and W. Collard, (Respondents). (*Dismissed*).

0468-81-U: Dr. Bidhu B. P. Sinha, (Complainant) v. Fanshawe College of Applied Arts and Technology, (Respondent) v. Ontario Public Service Employees Union, (Intervener). (*Dismissed*).

JURISDICTIONAL DISPUTES

1397-80-JD: Christian Labour Association of Canada, (Complainant) v. International Association of Heat & Frost Insulators & Asbestos Workers Local 95, Victor Churly, C. A. Smith Contractors Limited, Scope Mechanical Contractors Limited, (Respondents). (*Withdrawn*).

0697-81-JD: The International Association of Machinists and Aerospace Workers Local 268, (Complainant) v. The Ontario Paper Company Limited, (Respondent) v. The United Association of Journeyment and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 413, (Intervener). (*Withdrawn*).

0884-81-JD: International Association of Bridge, Structural and Ornamental Ironworkers Local 721, (Complainant) v. Folgor Construction Ltd. and Labourers' International Union of North America, Local 183, (Respondents). (*Withdrawn*).

1041-81-JD: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting industry of the United States and Canada, Local 628, (Complainant) v. Dickenson Mines Limited and Dominion Bridge Company Limited and International Association of Bridge, Structural and Ornamental Ironworkers, Local 759, (Respondents). (*Withdrawn*).

1057-81-JD: International Association of Bridge, Structural and Ornamental Ironworkers, Local 721, (Complainant) v. Consolidated Construction Limited and Labourers' International Union of North America, Local 183, (Respondents). (*Withdrawn*).

APPLICATIONS FOR DETERMINATION OF EMPLOYEE STATUS

0019-81-M: The Corporation of the City of Thunder Bay, (Applicant) v. Canadian Union of Public Employees, Local 87, (Respondent). (*Granted*).

0078-81-M: Sudbury Algoma Hospital, (Applicant) v. Ontario Nurses' Association, (Respondent). (*Granted*).

0349-81-M: CUPE Local 839, (Applicant) v. Chedoke-McMaster Hospitals, (Respondent). (*Withdrawn*).

0364-81-M: United Electrical, Radio & Machine Workers of America, (Applicant) v. Ethicon Sutures Limited, (Respondent). (*Granted*).

0685-81-M: Canadian Union of Public Employees and its Local 87, (Applicant) v. The Corporation of the City of Thunder Bay, (Respondent). (*Terminated*).

0173-81-M: International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), Local 1285, (Applicant) v. Hudson Bay Diecastings, (Respondent). (*Withdrawn*).

0723-81-M: Canadian Union of Public Employees, Local 1813, (Applicant) v. Muskoka Family and Children's Services, (Respondent). (*Withdrawn*).

0963-81-M: The Haldimand Board of Education, (Applicant) v. Canadian Union of Public Employees, (Respondent). (*Withdrawn*).

CONSTRUCTION INDUSTRY GRIEVANCES

1966-80-M: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 67, (Applicant) v. Braneida Mechanical Service Ltd., and Oliver Plumbing and Heating Limited, (Respondents). (*Dismissed*).

0084-81-M: Labourers' International Union of North America, Ontario Provincial District Council and Labourers' International Union of North America, Local 1089, (Applicant) v. Teperman and Sons Limited, (Respondent). (*Terminated*).

0428-81-M: International Association of Bridge, Structural and Ornamental Ironworkers, Local Union 700, (Applicant) v. Commercial Contracting Corporation of Canada Limited, (Respondent). (*Withdrawn*).

0521-81-M: United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 787, (Applicant) v. Michael R. Donovan, (Respondent). (*Withdrawn*).

0524-81-M: United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 787, (Applicant) v. Perrin-Turner Limited, (Respondent). (*Granted*).

0590-81-M: Labourers' International Union of North America, Ontario Provincial District Council, (Applicant) v. Napev Construction Limited, (Respondent). (*Withdrawn*).

0683-81-M: Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27, 666, 681, 1133, 1304, 1747, 1963, and 3227, and 3233, United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Scot Development Ltd., (Respondent). (*Granted*).

0704-81-M: International Union of Operating Engineers, Local 793, (Applicant) v. Steed Evans Limited, (Respondent). (*Withdrawn*).

0786-81-M: International Union of Operating Engineers, Local 793, (Applicant) v. Arlington Crane Service Limited, (Respondent). (*Granted*).

0808-81-M: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 552, (Applicant) v. Skippy's Plumbing Co. Ltd., (Respondent). (*Granted*).

0948-81-M: International Association of Heat and Frost Insulators and Asbestos Workers, Local 95, (Applicant) v. Thunder Bay Insulation Ltd., (Respondent). (*Withdrawn*).

1061-81-M: Carpenters' District Council of Toronto and Vicinity on behalf of Local 1190, United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Scot Developments Ltd., (Respondent). (*Granted*).

1062-81-M: Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27, 666, 681, 1133, 1304, 1747, 1963, and 3227, and 3233, United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Scot Development Ltd., (Respondent). (*Granted*).

1102-81-M: International Union of Operating Engineers, Local 793, (Applicant) v. Employer Bargaining Agency and R & G Jackson Contracting Ltd., (Respondents). (*Withdrawn*).

1125-81-M: United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry fo the United States and Canada, Local 628, (Applicant) v. Dominion Bridge Company Limited, (Respondent). (*Withdrawn*).

1154-81-M: United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 46, (Applicant) v. Bill Watson & Co. Limited, (Respondent). (*Withdrawn*).

1172-81-M: Chatham Construction Workers Association, Local #53 affiliated with the Christian Labour Association of Canada, (Applicant) v. Mack Glass Limited, (Respondent). (*Withdrawn*).

1187-81-M: Labourers' International Union of North America, Local 1059, (Applicant) v. McKinlays of Cambridge Ltd., (Respondent). (*Granted*).

1189-81-M: Labourers' International Union of North America, Local 1059, (Applicant) v. R. L. Coolsaet of Canada Limited, (Respondent). (*Granted*).

1195-81-M: Carpenters' District Council of Toronto and Vicinity on behalf of Local 27, 666, 681, 1133, 1304, 1747, 1963, 3227, and 3233, United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Multi-Wall & Ceiling Systems Limted, (Respondent). (*Granted*).

1202-81-M: International Union of Operating Engineers, Local 793, (Applicant) v. Spadco Construcion Co. Ltd., (Respondent). (*Granted*).

1280-81-M: The Carpenters' Section of the Carpenters' of the Carpenters' District Council of Toronto and Vicinity, United Brotherhood of Carpenters and Joiners of America, on behalf of Local Union 1190, (Applicant) v. Union Carpentry Contractors Ltd., (Respondent). (*Granted*).

1289-81-M: United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 787, (Applicant) v. G.T.S. Mechanical Services, (Respondent). (*Withdrawn*).

1290-81-M: United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 787, (Applicant) v. Prime Energy Systems Ltd., (Respondent). (*Withdrawn*).

1291-81-M: United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 787, (Applicant) v. North York Mechanical Ltd., (Respondent). (*Withdrawn*).

1292-81-M: United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 787, (Applicant) v. Ind-Com Engineering, (Respondent). (*Withdrawn*).

1294-81-M: United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 787, (Applicant) v. Custom Refrigeration Limited, (Respondent). (*Withdrawn*).

1295-81-M: United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 787, (Applicant) v. Perrin Turner Limited, (Respondent). (*Withdrawn*).

1302-81-M: Carpenters' District Council of Toronto and Vicinity on behalf of Local 27, 666, 681, 1133, 1304, 1963, 1747, and 3227 and 3233, United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Scot Development Limited, (Respondent). (*Granted*).

1303-81-M: Carpenters' District Council of Toronto and Vicinity on behalf of Local 1190, United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Scot Development Limited, (Respondent). (*Granted*).

APPLICATIONS FOR RECONSIDERATION OF BOARD'S DECISION

0895-81-R: International Union of Operating Engineers, Local 793, (Applicant) v. R. M. Elliot Construction Ltd., (Respondent). (*Denied*).

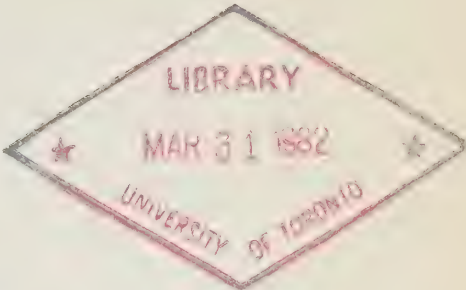
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**A Monthly Series of Decisions from the
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Cited [1981] OLRB REP. NOVEMBER

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**0543-81-R Union of Bank Employees Local 2104 (Ontario) C.L.C.,
Applicant, v. Airline (Malton) Credit Union Limited, Respondent**

Employee – Whether stenographer doing typing for manager employed in confidential capacity relating to labour relations – Whether assistant manager, head teller, teller/supervisor and loan officer exercising management functions

BEFORE: R. D. Howe, Vice-Chairman, and Board Members C. G. Bourne and O. Hodges.

APPEARANCES: *Douglas West and Susan Van Arragon for the applicant; R. N. Gilmore, W. D. Robertson and D. Elenbass for the respondent.*

DECISION OF THE BOARD; November 16, 1981

1. This is an application for certification in which the parties met with a Board Officer prior to the initial hearing scheduled in this matter and reached agreement on all matters in dispute between them with the exception of the list and composition of the bargaining unit.
2. Having regard to the agreement of the parties, the Board is satisfied that the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act*.
3. The parties are in partial agreement with respect to the description of the bargaining unit. They have agreed that the description should commence with “all office, clerical and technical employees of the respondent at Malton, Ontario” but they are in dispute as to whether the first line level of management to be excluded from the bargaining unit should be the Manager, as contended by the applicant, or the Assistant Manager, as submitted by the respondent. In addition to the Assistant Manager, the respondent also seeks the exclusion of Headteller, Teller/Supervisor, and Loan Officer on the basis that they exercise managerial functions within the meaning of section 1(3)(b). The respondent further seeks the exclusion of Teller/Payroll Clerk and Steno/Receptionist on the ground that they are employed in a confidential capacity in matters relating to labour relations within the meaning of section 1(3)(b). The applicant, on the other hand, opposes the exclusion of each of those positions.
4. The applicant also challenged the list of employees filed by the respondent in this matter. In view of those disagreements, a Board Officer was appointed to inquire and report back to the Board on the list and composition of the bargaining unit.
5. At the meeting of the parties convened by the Board Officer pursuant to his appointment, the parties reached agreement with respect to the list. Since no agreement was reached on the status of the exclusions requested by the respondent, an examination of their respective duties and responsibilities ensued and a report was duly prepared by the Board Officer. At the request of the respondent, a hearing was scheduled for the purpose of considering the representations of the parties with respect to that report.
6. The respondent is a credit union which operates at Toronto International Airport. Its main office is located in a building which also contains hangar facilities. It also operates a branch in Terminal 2 of the Airport.
7. The respondent seeks the exclusion of Teller/Payroll Clerk Carol Oates and

Steno/Receptionist Susan Van Arragon on the ground that they are “employed in a confidential capacity in matters relating to labour relations” within the meaning of section 1(3)(b) of the Act, which provides:

“Subject to section 90, for the purposes of this Act, no person shall be deemed to be an employee,

...

- (b) who, in the opinion of the Board, exercises managerial functions or is employed in a confidential capacity in matters relating to labour relations.”

United Community Fund of Greater Toronto, [1979] OLRB Rep. Dec. 1292, contains a useful review of the purpose and scope of that provision:

“3. The purpose of section 1(3)(b) of the Act is to ensure that persons who are within a bargaining unit do not find themselves faced with a conflict of interest, as between their responsibilities and obligations as persons who ‘exercise managerial functions or are employed in a confidential capacity in matters relating to labour relations’ and their responsibilities and obligations as members of the unit. Collective bargaining, by its very nature, requires an arm’s length relationship between the ‘two sides’ whose interests, objectives and priorities are often divergent. Persons employed in a confidential capacity relating to labour relations are regularly involved with information and matters which, if disclosed, would adversely affect the collective bargaining interests of the employer. Section 1(3)(b) ensures that the employer need not be concerned that such persons will have ‘divided loyalties.’

4. Section 1(3)(b) involves three separate criteria: the disputed individual must be employed in a confidential capacity; the material with which that individual works must be confidential; and the material must be related to labour relations. The Board summarized its approach to these criteria in *York University*, [1975] OLRB Rep. Dec. 945 at page 951:

‘... the Board must be satisfied of ‘a regular, material involvement in matters relating to labour relations’ to justify a finding excluding a person from operation of the Act. (See, *The Falconbridge Nickel Mines Ltd.* case, [1969] OLRB Rep. September 379). Mere access to confidential information that may pertain to labour relations, standing alone, is no reason for excluding employees from the bargaining unit. (*The Metropolitan Separate School Board* case [1974] OLRB Rep. Apr. 220). Nor is mere knowledge of matters that may be deemed ‘confidential’ in the sense that the employer would not approve of disclosure of such information by his employees sufficient to justify a positive finding under section 1(3)(b). (See *The Comtech Group Limited* case [1974] OLRB Rep.

May 291). The important test is whether there is a consistent exposure to confidential information on matters relating to labour relations so as to constitute such exposure an integral part of the employee's service to the employer's enterprise. (See, *Toledo Scale Division of Reliance Electric Limited* case [1974] OLRB Rep. June 406).

5. The handling of collective bargaining information must be at the core of the disputed individual's job functions. An occasional or peripheral involvement is insufficient to justify his exclusion. As the Board observed in *Falconbridge Nickel Mines Ltd.*, [1966] OLRB Rep. Sept. 379:

'A person to be excluded under this provision must be employed 'in a confidential capacity', i.e., such capacity must be part of his regular duties. An accidental or isolated involvement in some aspect of labour relations is not sufficient, in our view, to exclude a person from collective bargaining. However, a regular material involvement in matters relating to labour relations which are confidential because their disclosure would adversely affect the interest of the employer would exclude a person pursuant to the provisions of section 1(3)(b) of the Act. As can be readily seen, the degree of the involvement and the extent of the confidential nature of the matters dealt with become important factors to be considered in determining exclusions under these provisions.

The application of this 'test' to the facts in *Frito-Lay Canada Ltd.*, [1978] OLRB Rep. Sept. 831 prompted the Board to reach the following conclusion:

'While the evidence indicates that the payroll clerks have regular access to a certain amount of confidential information, the Board is not convinced that this type of information is integral to the conduct of collective bargaining by the respondent. These payroll clerks merely collect and collate individual payroll information relating to individual employees. Access to such information does not make them privy to the respondent's industrial strategy, and the Board must conclude that these employees are not employed in confidential capacity in matters relating to labour relations.'

6. It is also necessary that the information with which the disputed employee works is 'confidential' so that its disclosure would undermine the employer's industrial relations position *vis-à-vis* his employee(s). In *Holophane Co. Ltd.*, [1972] OLRB Rep. Dec. 999 the Board found that a switchboard operator, who had access to the absenteeism and disciplinary records of employees was not employed in a 'confidential capacity' because the employees knew, or should have known, the contents of those records. And in *Daal Specialties Ltd.*, [1973] OLRB Rep. Nov. 592, the Board concluded that a switchboard-receptionist who

types replies to grievances was not employed in a confidential capacity since these replies were obviously known to trade union officials to whom they were sent and were in no sense 'confidential.'"

(See also *Chelsea Park Nursing Home*, [1978] OLRB Rep. Dec. 1080; *Board of Education for the Borough of Scarborough*, [1980] OLRB Dec. 1713; *R.C.A. Limited*, [1980] OLRB Sept. 1316; and *Spruce Falls Power & Paper Co. Ltd.*, [1980] OLRB Rep. Jan. 110.)

8. Having regard to all of the evidence set forth in the Board Officer's report and to the submissions of the parties, the Board is of the opinion that Teller/ Payroll Clerk Carol Oates is not employed in confidential capacity in matters relating to labour relations. Many of her duties have nothing whatever to do with labour relations; for example, she opens new accounts as they come in and checks the daily transactions list to ensure that customer deposits and withdrawals have been posted correctly. The information concerning salaries and benefits to which she has access through her preparation of the payroll and reports concerning tax deductions, pension, salary continuance and other benefits is not confidential information since it is known by the individual members of the bargaining unit. Moreover, it is the type of information that an employer is required to provide to a trade union, once it has been certified and has served notice to bargain, as part of the employer's section 15 duty to bargain in good faith and make every reasonable effort to make a collective agreement (see *DeVilbiss (Canada) Limited*, [1976] OLRB Rep. Mar. 49). Access to such information does not make Ms. Oates privy to the respondent's industrial relations strategy (see *Frito-Lay Canada Limited*, [1978] OLRB Rep. Sept. 831). Similarly, the fact that to assist her in the performance of her duties, Ms. Oates, on her own initiative, implemented a system by which she records in a book all occasions on which employees are absent or late does not bring her position within section 1(3)(b) as that information is also not confidential. As noted by the Board in *The Holophane Company Limited*, [1972] OLRB Rep. Dec. 999, at paragraph 3, "the employee concerned is certainly aware of his absence and the report of his absence is not a matter which is confidential." Moreover, it is clear from the evidence of Ms. Oates that no disciplinary action has ever been taken by the respondent on the basis of the information that she records. She is not privy to information respecting projected hirings or wage increases; she does not become aware of wage increases until the Manager has made a decision concerning such increases and directs her to implement it.

9. We are, however, satisfied that Steno/Receptionist Susan Van Arragon is employed in a confidential capacity in matters relating to labour relations and should, therefore, be excluded from the bargaining unit. In addition to her duties as a receptionist, Ms. Van Arragon types correspondence for the office including most of the correspondence of the Manager, for whom she has typed at least one letter of discharge and the respondent's reply to this application, including the Schedule "A" list of employees. In support of the respondent's request that this position be excluded from the bargaining unit, counsel submitted that the respondent has no position or employee, other than the Steno/ Receptionist, to type collective agreement proposals for the respondent in the event the applicant is certified by the Board.

10. In finding a Receptionist-Secretary to be employed in a confidential capacity in matters relating to labour relations, the Board in *The Regional Municipality of Haldimand-Norfolk*, (*Norview Home for the Aged*), Board File No. 2193-76-R, decision dated July 8, 1977, unreported, noted that the individual in question "typed a list of employees contained in the respondent's reply to an earlier application for certification before this Board, a list which

by the practice of this Board is viewed as confidential to the employer". As stated by the Board in *Town of Gananoque*, [1981] OLRB Rep. July 1010, at paragraph 4:

"A central purpose for excluding from a bargaining unit persons who have access to confidential material relating to labour relations is so that the employer can know that its internal strategies and communications are known and handled exclusively by persons of undivided loyalty. In *The Regional Municipality of Haldimand-Norfolk, (Norview Home for the Aged)*, Board File No. 2193-76-R, unreported, July 8, 1977 the Board commented:

'Each case is to be determined on its own facts and on the totality of the evidence. Counsel for the applicant conceded, as he must, that the typing of lists of employees in applications for certification involves sensitive information as regards labour relations. The same is true of handling of and access to the employer's communications on its consultant on matters going to the heart of its strategy at the bargaining table. *Discreet secretarial help is essential to any employer and that is manifestly so in matters of labour relations.* The purpose of the section 1(3)(b) exclusion relating to confidentiality is to assure that the employer may freely function in the collective bargaining framework without the disability of any conflict of interest in a vital member of its team.'

(emphasis added)

(See also *Bank of Nova Scotia, Regina, Main Branch*, [1978] 2 Can. LRBR 65; 28 di 885, in which the Canada Labour Relations Board excluded the stenographer to the manager of a branch bank on the basis of its assessment of the managerial necessity of the employer to have a person in that branch that could, in the future, be relied upon to act in a confidential capacity.)

11. For the foregoing reasons, the Board is of the opinion that the position of Steno/Receptionist should be excluded from the bargaining unit pursuant to section 1(3)(b).

12. The approach generally adopted by the Board in determining whether a person "exercises managerial functions" within the meaning of section 1(3)(b) was described as follows in *Hydro Electric Commission of the Borough of Etobicoke*, [1981] OLRB Rep. Jan. 38:

"20. In making determinations under section 1(3)(b) of the Act the Board has continually recognized that effective collective bargaining necessitates an arms length relationship between employees on the one hand and management on the other. In acknowledgement of a fundamental divergence between the objectives, priorities and interests of the two groups, the managerial exclusion in section 1(3)(b) functions to exclude from the scope of 'employee' those persons who, because of the exercise of managerial functions and allegiance to management, would be placed in a position of conflicting interest if allowed to engage in collective bargaining.

21. The term 'managerial functions' is not defined by the Act. The Board, therefore, must assess the facts of each case to determine whether the duties and responsibilities in question have true managerial significance. In *Cottage Hospital (Uxbridge)*, [1980] OLRB Rep. March 304, the Board at pp. 305-306 summarized the approach it takes to evaluating whether an individual exercises managerial functions:

'Over the years the Board has developed general guidelines to assist it in evaluating whether an individual exercises managerial functions (see *Inglis Limited*, [1976] OLRB Rep. June 270, *Chrysler Canada Limited*, [1976] OLRB Rep. Aug. 396 and *McIntyre Porcupine Mines Limited*, [1975] OLRB Apr. 261). For those persons whose work has little or no impact on the employment relationship, the Board looks to whether or not they exercise independent decision-making responsibilities in matters of policy or the running of the organization. The Act does not operate to exclude those who only make effective recommendations in this regard. Nor does it exclude persons whose independent decisions are either circumscribed within pre-determined limits set by others or limited to technical and procedural determinations flowing from their expertise in a limited field. (See *Libby, McNeil and Libby of Canada*, [1967] OLRB Rep. May 193, *Inglis Limited*, *supra*; and *Dominion Stores Limited*, [1976] OLRB Rep. Aug. 44 and *Canadian General Electric*, [1979] OLRB Rep. Jan. 12).

Different considerations apply to the work of a second group of persons who may be characterized as having a direct effect on the employment relationship or the terms and conditions of employment of those in the employ of the organization. Supervisors of employees or those technical experts whose work affects terms and conditions of employment or hiring and employment policies would fall within this group. In determining whether such persons whose work has a direct effect on the employment relationship exercise managerial functions, the Board assesses whether or not they exercise effective control and authority over employees either in direct contact with the employees or through their decisions. In making this evaluation the Board looks to whether the person has, at a minimum, the authority to make effective recommendations relating to conditions of employment. An effective recommendation is a 'serious recommendation that the evidence demonstrates is usually acted upon, and therefore a recommendation that materially affects the economic lives of employees'. (*McIntyre Porcupine Mines Limited*, *supra*, at 289).'

...

25. Exercising supervisory functions does not by itself exclude a person from engaging in collective bargaining. Even when a person is primarily engaged in the supervision of others he is not managerial unless he also

has effective control over their employment relationship. (See *Falconbridge Nickle Mines Limited*, [1976] OLRB Rep. Sept. 379 and *McIntyre Porcupine Mines, supra.*) . . .”

13. Having regard to those considerations, the Board is of the opinion that neither Headteller Dianne Crichton nor Teller/Supervisor Terry Morawski exercise managerial functions within the meaning of section 1(3)(b). Each of them primarily a teller with some additional duties such as giving the other tellers their money from the respondent's safes for which they have the respective combinations, preparing bank deposits, and assisting tellers in “balancing” at the end of the day. Ms. Crichton, who works at the respondent's main office, has four tellers under the supervision. Ms. Morawski supervises only one teller who, together with herself, constitute the respondent's entire staff at its Terminal 2 branch. Although they spend most of their working hours at the branch, Ms. Morawski and teller begin and end each work day at the main office where the actual bookkeeping is performed. After arriving at the main office and picking up the necessary materials, they are driven to the branch by the Manager. At the end of the day, they return to the main office with their cheques, withdrawals, deposits slips, etc. Neither Ms. Crichton nor Ms. Morawski have power to hire, discipline or discharge employees, nor do they have any influence over the wage rates of other employees. They are not involved with scheduling employees to work nor do they have power to grant time off to other employees or to authorize them to work overtime. Ms. Crichton stated that she can require tellers to stay after work if they are unable to balance their monthly transactions for the day. However, it appears that it is generally understood by the tellers that they must remain until they have “balanced” and they will not be paid for the time which that takes (except on Air Canada pay days which are particularly busy days for the respondent's operations). Ms. Crichton and Ms. Morawski's primary function in this regard appears to be assisting their tellers in locating their errors so as to duly complete the balancing process. Under the circumstances, we are not satisfied that either of them exercise managerial functions with respect to the balancing process. If such balancing efforts ultimately fail, Ms. Crichton can write off the imbalance. However, the imbalances are usually “just small ones” and she does not act on her own initiative for “anything over thirty dollars”.

14. Neither of the individuals in question are generally involved in the hiring process although Ms. Crichton provided the Manager with the names of two friends whom she wished to assist in obtaining employment. To improve their chances of being hired, she “took stuff home and showed them how to do everything”. However, it is clear from the evidence that Mr. Crichton provided them with this “training” not as part of her normal job functions but rather during non-working hours as a generous act of friendship. Ms. Crichton and Ms. Morawski are also not generally involved in assessing the performance of other employees although Ms. Crichton was asked on one isolated occasion by the prior Manager to write out what she thought about one teller who was subsequently discharged. Although counsel for the respondent submitted that this incident demonstrated that Ms. Crichton had the power to effectively recommend discharge, the Board is not satisfied on the rather vague evidence concerning that one isolated instance that Ms. Crichton exercised managerial functions on that occasion. Indeed, the evidence of Assistant Manager Marilyn Innis indicates that during her seventeen years of employment with the respondent, only two people have “had to be let go” and it may reasonably be inferred from her evidence that the Manager's decision to discharge them was not based on the observations or recommendations of any one person, but rather upon the complaints and observations of all those who were work them. Thus, we are not satisfied that Ms. Crichton has the power to effectively recommend discharge in the

manner in which that concept has developed in the Board's jurisprudence. Similarly, although Ms. Morawski has been consulted by the Manager concerning her satisfaction with the performance of the various tellers who have been assigned to work with her at the branch from time to time, it appears that, with one isolated exception, Mr. Morawski's opinion has merely resulted in inadequately trained tellers being transferred back to the main office by the Manager without any disciplinary action or other adverse consequences to the employees in question. Mr. Crichton and Ms. Morawski do not attend managements and do not have any involvement in policy decisions.

15. We are also of the opinion that Assistant Manager Marilyn Innis does not exercise managerial functions. Although she supervises approximately ten people, she spends at least "75% of the day" doing bargaining unit work. With respect to the other 25% of the day, she stated: "Sometimes I get around to my own work... I have no job description in writing... But it is my understanding that my job should be supervisory which it never has been... I consider my own job to be probably reconciliation of banks, the accounting end of it more than anything, which is very difficult to get done... You see the job never changed. I asked for a raise three years ago and the reply was, we can't give you a raise in that classification. We'll make you Assistant Manager. But the job never changed. So that's what happened. It should have been clarified a long time ago" Ms. Innis is not involved in hiring and her involvement in dismissal of employees is minimal. The Report, read as a whole, indicates that discharges are extremely rare and are made by the Manager after consultation with the Assistant Manager, the Headteller or Teller/Supervisor and the affected employee's co-workers. The Board is not satisfied on the evidence before it that the Assistant Manager has made effective recommendations with respect to discharge or other disciplinary action.

16. Decisions concerning overtime are generally made by the Manager. The Assistant Manager sometimes permits employees to work overtime but never requires them to do so. She has no involvement in drafting the respondent's annual or monthly budget. When the Manager is on vacation, the Assistant Manager fills in for him. When she does so, she receives his salary and his expense account. During his absence, she has also attended meetings of the Board of Directors (approximately 10 times in 17 years). Her function at those meetings was to deliver the report prepared by the Manager concerning matters such as expenses, and new members. Assuming, without deciding, that the Assistant Manager performs managerial functions during the Manager's annual vacation, the Board is of the view that this should not cause her to be excluded from the bargaining unit employee to temporarily assume the duties and responsibilities of a position excluded from the bargaining unit so as to fill a temporary void caused by illness or vacation. The occasional assumption of such duties and responsibilities does not deprive the individual of status as an employee in the bargaining unit. As stated by the Board in *Page Hersey Employees' (Welland) Credit Union Limited*, Board File No. 2839-80-R, decision dated August 11, 1981, unreported, at paragraph 4:

"It is important to the scheme of collective bargaining, and particularly to the interests of an employer, that persons who by virtue of their duties and responsibilities would be in a position of conflict of interest as between their employer and their union if they were included in a bargaining unit fall outside the ambit of union representation. The right of individuals to the benefit of collective bargaining are not lightly to be denied, however. *Managerial or confidential duties must be a substantial and regular part of an individual's responsibilities if they are to be*

excluded, (see, e.g. United Community Fund of Greater Toronto, [1979] OLRB Rep. Dec. 1292; York University, [1975] OLRB Rep. Dec. 945)."
(emphasis added)

17. The final position that must be considered by the Board in this matter is that of Loan Officer Anita Reid. The respondent's By-laws contain the following provisions concerning that position:

"5.01 The board of directors shall appoint one or more employees of the Credit Union, to consider loan applications and to approve loans to members.

5.02 The person(s) so appointed shall be known as the loan officer(s) whose duties shall be those of the credit committee under The [Credit Unions and Caisses Populaires] Act and shall include:

- (a) the keeping of accurate records of all loan applications received and processed;
- (b) the submission of a written monthly report to the board of directors stating the number of loan application received, the number and category of loans granted, the security obtained for such loans, the loan applications denied and a report on all renegotiated and delinquent loans;
- (c) the submitting of a written annual report to the annual meeting of the Credit Union.

5.03 The loan officer shall act upon any application of a member for the postponement or the renegotiation of any loan payments.

5.04 The loan officer shall be bonded for the honest and faithful performance of duties in such amounts as may be determined by the board of directors.

5.05 As long as this by-law remains in force it shall not be necessary to elect a credit committee as required by section 48(1) of the Act."

Ms. Reid, who has held her position from almost three years, reports to the Manager and to the Board of Directors through her written monthly report. She takes loan applications through personal interviews with members, follows up with credit checks, arranges insurance for the loans, and arranges for loan cheques to be prepared by the tellers who are empowered to issue such cheques. Ms. Reid has no involvement in hiring, discharging or disciplining employees, nor does she have any effective control or authority over them. In describing her functions to the Board she stated, "... the only thing I do is process loans". Within the limits specified in the By-laws, the granting of loans, including loans to Directors and to employees of the respondent who are also members of the respondent, is within her sole discretion; no one performs a double check before the loan is granted, although Ms. Reid does go to the Manager if she feels there is a problem and wants a second opinion. Included in the By-laws are the following provisions concerning loans:

"10.03 The total amount on loan to any member at any time shall not exceed \$1,000.00 unless security therefor has been given.

10.04 Security may be deemed to include an assignment of wages, an assignment of book debts or of other moneys receivable, a chattel mortgage, the co-making of a promissory note or other equivalent collateral, provided that no wage assignment shall be filed with the employer or any member, except with the approval of the board of directors.

10.05 Loans may be made to a member who is a natural person, within the following limits:

(a) Up to \$10,000 in excess of the member's shares and deposits provided a security referred to in paragraph 10.04 has been given for the loan;

(b) Up to \$20,000 in excess of the member's shares and deposits provided that the amount by which the loan exceeds the aggregate of \$10,000 and the member's shares and deposits has been secured by way of bonds, stocks, debentures or other equivalent collateral.

(c) Any amount fully secured by the member's shares and deposits subject to the limitations expressed in paragraph 10.07.

10.06 In addition to any amount that may be loaned under paragraph 10.05 loans may be made to a member who is a natural person on the security of a mortgage of real estate conforming to section 83 of the Act up to a maximum of \$50,000.00.

10.07 Notwithstanding any provision in paragraphs 10.05 and 10.06, the aggregate amount of all loans to any member who is a natural person shall not exceed \$70,000 or 5% of the total capital and deposits of the Credit Union, whichever is the lesser amount."

It was Ms. Reid's evidence that prior to this application for certification, she had given out some loans which were not in accordance with the provisions of the By-laws due to her unfamiliarity with the exact wording of the By-laws. It was also her evidence that she has processed approximately 10 loan applications by employees during her three years of employment.

18. Counsel for the respondent drew the Board's attention to *Atomic Energy Employees (Deep River) Credit Union Limited*, Board File No. 2337-80-R, decision dated May 4, 1981, unreported, in which the Board ruled that the loan officers employed by the credit union which was the respondent in that case, were employees in the bargaining unit. In rejecting the employer's contention that the loans officers should be excluded from the bargaining unit because they exercised managerial functions and because they were employed in a confidential capacity in matters relating to labour relations, the Board stated:

"3. The report of the labour relations officer does not bear out the contention of the respondent that the employees in question exercise managerial responsibilities. From the report it is quite clear it is only the manager of the respondent credit union which exercises managerial authority thus the loan officers are not responsible for discipline nor scheduling work or vacation or granting time off. Similarly all the hiring and firing has been done by the manager not by any of the loans officers. We are therefore of the view that on the basis of the report of the labour relations officer the loans officers do not exercise managerial functions.

4. The respondent also takes the position that the loan officers are employed in a confidential capacity in matters relating to labour relations. The origin of this argument is twofold first, that in dealing with the loan applications the loan officer have access to the personal data of employees. However, it is clear on the report of the labour relations officer that with respect to employees in this bargaining unit any loan applications are dealt with by a manager of the union rather than the loan officers. The respondent also argues that by the provincial statute governing *The Credit Unions and Caisses Populaires Act*, S.O. (1976), (2d), Chapter 62, loan officers are officers of the credit union. Although it is true that that Act may impose certain obligations on the loan officers as officers of the credit union it does not place them in a position of being 'employed in a confidential capacity in matters relating to labour relations.' That being the case we can so see no grounds for excluding the loan officers under this criteria either."

Counsel for the respondent sought to distinguish that case from the present case on the ground that unlike the loans officers in *Atomic Energy*, Ms. Reid does deal with loans to employees. It was his position that her authority to grant loans to employees would place her in a position of conflict of interest as she might be called upon to decide whether loans should be granted to employees for the purpose of financing a strike. Counsel also submitted that the "confidential" information concerning employees and Directors applying for loans should result in her exclusion. Dealing with the last point first, the Board is of the view that the information in question, while it may be "confidential" in the sense that it would be improper for Ms. Reid to divulge it to third parties, is not within the purview of section 1(3)(b) since it is not related to labour relations; the revelation of such information would not undermine the employer's industrial relations position vis-a-vis his employees (see the authorities cited earlier in this decision). With respect to the effect of Ms. Reid's authority in relation to employee loans, the Board is of the view that her authority to grant loans to Directors and employees of the respondent who are also members of the respondent does not deprive her of employee status under section 1(3)(b). The respondent's loan policies are determined by the members through their power to enact, repeal and amend the By-laws of the respondent. Ms. Reid merely applies the loans policy set forth in the By-laws, which require "security" to be given for any loan in excess of \$1,000, and further required "collateral" for any loan in excess of \$10,000. The evidence indicates that Ms. Reid has only received about three employee loan applications per year. Moreover, it appears to the Board that any concern which management may have with respect to loans to employees could easily be alleviated by simply requiring Ms. Reid to obtain the approval of the Manager for any such loans.

19. Counsel for the respondent further contended that the Loans Officer should be excluded because she exercised a function which, but for her appointment, would be a responsibility of the respondent's Board of Directors under section 48(1) of the *Credit Unions and Caisses Populaires Act*. In essence, this argument suggests that the Loan Officer should be excluded because she "manages" at least some of the respondent's financial resources. Notwithstanding the able argument of counsel for the respondent, the Board is of the view that the Loan Officer does not exercise managerial functions within the meaning of section 1(3)(b) of the Act. Ms. Reid does not hire, transfer, promote, discharge or discipline, nor does she make effective recommendations with respect thereto. She does not determine the respondent's loans policy but rather merely exercises her discretion within the limits specified in the respondent's By-laws. We are confirmed in our view by the decision of the Canada Labour Relations Board in *Bank of Nova Scotia, Regina, Main Branch, supra*, in which the Board in the somewhat analogous context of the main branch of a bank, held that a loan officer who had a "limit on any single loan of \$15,000" and who was responsible for approximately 740 accounts with a total indebtedness of \$4-1/2 million to his employer, did not exercise managerial functions. The essence of the Board's reasoning is contained in the following passage for that decision (at page 72-73):

"The employer seeks to have the concept of 'management function' interpreted very broadly. It seeks to have the expression treated as a term of art whose meaning is dependent upon that concept of management in schools of business or management theories, which are in themselves many and varied. It seeks this by the simple proposition that because a bank's business is to lend and a scotia plan loan officer makes lending decisions then a scotia plan loan officer performs a management function. It does not accept that this is equivalent to saying that if a fire department's business is to fight fires then fire fighters perform a management function; or if an airline's business is to fly passengers then pilots perform a management function; or if a radio business is to broadcast then disc jockeys or hot line operators perform a management function; or that stock brokers, interns, policemen, truck drivers, etc. perform a management function. The employer distinguishes each of these as merely a high level of mechanical or technical responsibility or responsibility closely regulated by law. The scotia plan loan officer is said to be different because he assumes some risk for the employer and 'manages' a financial portfolio. We do not accept this distinction. The scotia plan loan officer operates within-in the bank's policy, his limit and many consumer and banking laws. Because he 'manages' money he no more manages than does a pilot of a jumbo aircraft who is entrusted with lives and a multi-million dollar asset, or a policeman who is entrusted with high social responsibility, or a truck driver carrying valuable or explosive freight, or a disc jockey entrusted with performing adequately to maintain or improve a radio station's ratings, or many other employees in society upon whom employers rely to carry out their business in a manner that will achieve the objective of a profit. As with others, a scotia plan loan officer is trained to perform a task and is given some discretion in its performance. This happens to relate directly to money matters, but this does not distinguish him from others who perform tasks which are the essence of an entrepreneur's business.

Discourteous or overly aggressive behaviour or poor judgment by many employees in society can have as serious an impact on a business as it can with a scotia plan loan officer and in many instances the financial consequences can be more serious. We do not accept the employer's concept of management functions as consonant with the meaning this phrase should have within Part V of the Code and find the scotia plan loan officer to be an employee and appropriate for inclusion in the unit as in earlier cases."

(See also *The Royal Bank of Canada, Gibsons Branch*, 26 di 509, at 539).

20. Accordingly, having regard to the partial agreement of the parties with respect to the bargaining unit, and to the foregoing determination with respect to the disputed classifications, the Board finds that all office, clerical and technical employees of the respondent at Malton, Ontario, save and except Manager, persons above the rank of Manager, and Steno/Receptionist, constitute a unit of employees of the respondent appropriate for collective bargaining.

21. The Board is satisfied on the basis of all the evidence before it that more than fifty-five per cent of the employees of the respondent in the bargaining unit at the time the application was made, were members of the applicant on June 18, 1981, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purposes of ascertaining membership under section 7(1) of the said Act.

22. A certificate will issue to the applicant.

0384-81-OH Laurie Meaden, Complainant, v. Tal Swartz, carrying on business under the name of AMS Diamonds, Respondent.

Health and Safety – Employee refusing to work with hydro cyanide – Whether reasonable grounds to believe that work dangerous – Whether subsequent confirmation that work safe by safety inspector diminishing employee's rights – Whether quit or discharge – Whether discharge for exercise of rights under Act

BEFORE: M. G. Picher, Vice-Chairman, and Board Members W. G. Donnelly and M. J. Fenwick.

APPEARANCES: *Paul Reinhardt for the complainant; Barry Edson and Tal Swartz for the respondent.*

DECISION OF M. G. PICHER, VICE-CHAIRMAN, AND BOARD MEMBER M. J. FENWICK; November 25, 1981

1. The complainant alleges that she has been discharged by the respondent contrary to the provisions of section 24 of *The Occupational Health and Safety Act*, R.S.O. 1980, c. 321. She requests that she be compensated for all wages and benefits lost as a result of her discharge.

2. The respondent is a small jewellery manufacturer in Toronto. At the material time he employed one full-time employee and one part-time employee, as well as himself in his shop located on Peter Street. On November 1, 1980 he hired the complainant, Laurie Meaden, to work as a jeweller. Her duties at that time consisted primarily of polishing, soldering and repairing jewellery. At the time she was hired the complainant was a recent graduate of George Brown College with specialized training in the manufacturing of jewellery. Following her graduation in April of 1980 she spent three months under an Ontario student program working at The Jewellery Factory, a larger jewellery manufacturer in Toronto. From November of 1980 to May of 1981 her responsibilities consisted mainly in repairing jewellery with occasional sales and reception responsibilities in the showroom on the respondent's premises. It is common ground that she was restricted to the simpler tasks, while more complex work, such as grinding, was performed by Mr. Swartz, a man of some fifteen years' experience as a jeweller.

3. On or about May 4, 1981, Mr. Swartz introduced a new process into his operation. Until that time any work that involved electrolytic plating or stripping of gold jewellery had been jobbed out. On that day, for the first time, he began to do electro-plating and stripping on his own premises.

4. The equipment involved is simple. The electro-plating machine is a small electrical transformer, to all outward appearances like an automobile battery charger, which reduces electricity from 120 volts to anything from 6 volts to 20 volts as required. The machine has electrical leads to two small alligator clips which function as electrodes. Electro-plating is accomplished by immersing a piece of gold leaf clipped to one electrode and the piece or pieces of jewellery in question clipped to the other, into an electrolytic solution and briefly conducting electricity through the solution. The solution is a mixture of water and a solution base used universally in the trade and available under the commercial name "Vigor Solution". For the electrolytic process it is placed in a crystal beaker, having previously been heated to a

temperature of 70 to 80 degrees centigrade. One of the ingredients in the Vigor solution is cyanide; in certain conditions, therefore, the electrolytic solution can give off hydrogen cyanide gas which, in sufficient concentrations, can be highly toxic. It is common ground that care must therefore be used in the mixing of the solution and in providing adequate ventilation when the solution is being used.

5. Dr. Roland F. Grossman gave evidence respecting the toxicity of hydrogen cyanide gas. In concentrations of 300 parts per million or more it can cause death by inhalation within seconds. The threshold limit value for human exposure established by the American Conference of Governmental and Industrial Hygienists is ten parts per million. Ill effects can be produced at levels in excess of that amount, depending on the concentration of gas and the length of exposure. For example, Dr. Grossman testified that exposure to 50 parts per million would produce death within four minutes. Dr. Grossman explained that hydrogen cyanide interferes with the metabolic processes at the tissue level, preventing the transfer of oxygen to and from body tissue, thereby blocking the function of respiration at the cellular level. Exposure to concentrations of hydrogen cyanide gas at 25 to 30 parts per million can induce headache, a general feeling of aches and pain, vague discomfort and an inability to think clearly. Toxic effects can also be caused by the ingestion of cyanide solution or its absorption through the skin. It is therefore important to take precautions to avoid splashing when cyanide solutions are being handled.

6. The complainant had some experience working with electrolytic equipment and material during her course at George Brown College. As part of her training she was cautioned against the danger of cyanide solutions. Ms. Meaden's evidence is that at both George Brown College and The Jewellery Factory where she had worked previously electrolytic plating and stripping is carried out on work benches which are equipped with large overhead hood ventilators.

7. What Ms. Meaden saw Mr. Swartz set up in his shop on May 4, 1981 was something considerably different. He decided to do the electro-plating in a small four-piece bathroom on the premises. He improvised a work bench by removing a drawer from a chest and laying it, inverted, across the bathtub. The electro-plating machine, beaker, solution and jewellery were then placed on the make-shift table. The only apparent ventilation in the bathroom is a ceiling vent or grill connecting the room to the central heating and air-conditioning system of the building in which it is located.

8. Having thus set up his electro-plating operations, at approximately 10:00 a.m. on May 4, 1981, Mr. Swartz summoned the complainant to watch as he processed a number of pieces of jewellery in the electrolytic solution. There is no doubt either in the evidence of Ms. Meaden or of Mr. Swartz that the complainant was immediately frightened. She refused to enter the bathroom while Mr. Swartz did the electro-plating, and stood at some distance, outside the door during the entire operation. The evidence establishes that Mr. Swartz processed a number of pieces of jewellery, taking between ten and twenty minutes to do so. By the complainant's account she stood within four or five feet of the beaker of solution, while the respondent's testimony would place her some eight to ten feet away. At the very least the evidence of both confirms that she remained outside the door of the bathroom in considerable fear.

9. The complainant's fears began some time prior to the first use of the electro-plating

machine. On April 28, 1981 when Mr. Swartz first brought the electro-plating machine into the shop and set it up on the bathtub Ms. Meaden asked him whether she would be required to work with it. She was told nothing definite. She then made several inquiries to ascertain the opinion of others with respect to the safety of doing electro-plating in the bathroom under the conditions which were apparently being established by Mr. Swartz. She first contacted her instructor at George Brown College who, upon hearing a description of the physical arrangement told her that in his opinion it was not a safe situation. She then phoned the Industrial Accident Prevention Association. The person with whom she spoke confirmed her instructor's opinion. Finally she called the Occupational Branch of the Ministry of Labour and was advised by a Mr. O'Reilly that what she described seemed to be an unsafe situation. According to her testimony he advised her that she should continue working if possible but that if she felt in any peril she should call an inspector and stand by in a safe area of the shop pending an inspection. While none of the three persons with whom she spoke testified in these proceedings, and the truth of the statements which they purportedly made is not established to the extent that they are hearsay opinions through the complainant, the evidence is nevertheless admissible for the limited purpose of establishing, as we find it does, that the complainant entertained fear of hydrogen cyanide poisoning from the time the electro-plating apparatus was set up in the shop and that she received three separate sources of advice which reinforced her concern.

10. The complainant's cause for concern did not cease when the initial electro-plating work was finished on May 4, 1981. She testified that when she returned to her work bench, located some thirty feet distant from the bathroom, she could still smell the almond aroma of the electro-plating solution. On the unchallenged evidence, the solution was left in the crystal beaker with only a make-shift cardboard cover when the electro-plating machine was not in use. As she worked through the balance of the day she felt some dizziness and nausea and began to worry about whether those symptoms had been caused by exposure to hydrogen cyanide fumes.

11. After work she went directly to Women's College Hospital where she was examined by two doctors. At the time of her visit to the hospital the complainant's symptoms included light-headedness, dizziness, aches in the legs, a "tingly feeling" and shortness of breath. A medical examination, a report of which was submitted in evidence, determined that she had a normal body temperature and pulse, and a normal blood pressure. Her rate of respiration was slightly higher than normal and some cyanosis or blue colouration was evident in the extremities of her body. A blood test revealed a marked decrease in the acidity of her blood, a low concentration of carbon-dioxide, and a high concentration of oxygen in the blood. The doctors who examined Ms. Meaden diagnosed the cause of her problem as "exposure to noxious fumes". They prescribed no medication but sent her home and, according to her evidence, advised her that she would be foolish to return to the same work situation.

12. A substantial part of the respondent's case was to adduce evidence through Dr. Grossman to establish that the symptoms described and the tests recorded in the medical report are as consistent with a condition of hyperventilation caused by stress as with toxicity as a result of noxious fumes. More specifically, Dr. Grossman gave firm and un rebutted evidence to establish that the medical evidence reflected in the report does not support a conclusion that the complainant specifically suffered any ill effect from exposure of hydrogen cyanide gas. In particular Dr. Grossman testified that a significant exposure to cyanide would normally cause a higher pulse rate and a lower rate of respiration as well as a significant loss of blood pressure.

In his view the results of the test on arterial blood gases taken at Women's College Hospital rule out cyanide poisoning to the extent that a higher presence of lactic acid was not found in the blood; the complainant appeared to have a marked decrease in acidity. Dr. Grossman advanced the opinion, based on the material in the medical report, that in all likelihood the complainant was suffering from hyperventilation, a condition which could be caused by a number of factors including anxiety. On the other hand, while he ruled out the possibility of any cyanide poisoning, he did not categorically disagree with the diagnosis of the doctors at Women's College Hospital. He allowed that the same symptoms could have been caused otherwise than by hyperventilation, and could have been caused by exposure to noxious fumes as diagnosed in the emergency ward report.

13. While the evidence of Dr. Grossman is instructive and helpful to the Board in a general sense, it can have only a limited bearing on the merits of the case. To succeed in her complaint under the *Occupational Health and Safety Act*, the complainant must, as a first condition, establish that she had grounds for concern about her safety. She need not establish that she actually suffered some degree of cyanide poisoning. The evidence of Dr. Grossman, if anything, confirms that on the evening of May 4, 1981 the grievor was feeling symptoms consistent with some form of illness which could have been induced by exposure to noxious fumes. Even on Dr. Grossman's analysis of the medical evidence it would appear at the very least that Ms. Meaden was experiencing hyperventilation, a condition consistent with anxiety or fear. On any view of the evidence it appears that on the evening of May 4, 1981 Ms. Meaden had a basis for concern. In addition to the warnings which she had obtained previously from three sources, she now had the disquieting experience of having felt ill effects which she believed resulted from exposure to the hydrogen cyanide fumes, along with the confirmation of medical tests and a written medical report that she had suffered ill effects because of exposure to noxious fumes. That was her state of mind as she went to work on May 5, 1981.

14. That is the day when the events critical to this complaint occurred. There is some dispute as to who initiated a discussion between Ms. Meaden and Mr. Swartz about the electro-plating work on the morning of that day. We need not resolve that dispute for the purposes of this complaint. It is clear on the evidence before us that day the complainant and her employer had an argument regarding whether or not Ms. Meaden must work with the electrolytic solution in the bathroom. By Mr. Swartz's own evidence Ms. Meaden categorically stated that she would not perform that work because she considered it dangerous to do so. by his own account Mr. Swartz indicated to Ms. Meaden that to be a jeweller it was imperative that she do stripping and electro-plating with the cyanide solution. In his own words "I said if she doesn't like the conditions she can quit or give me her notice". It is clear from the demeanour of Mr. Swartz as observed by the Board that he is a man of strong opinion, that he felt Ms. Meaden's position to be entirely unjustified by his years of experience as a jeweller, and that he put that choice to her in clear and forceful terms. The evidence of Ms. Meaden, which the Board accepts, is that she felt that she had no alternative at that point. She believed that in effect her employer was saying "Do this work or get out". Since she believed that to do the work would jeopardize her physical well-being she determined that she was without any alternative and left the premises.

15. Immediately after leaving the shop Ms. Meaden telephoned inspector O'Reilly of the Occupational Health Branch to complain about what had happened and to ask that an inspection of the premises be conducted. Unfortunately it seems that the Branch took the view that an immediate inspection was not warranted because Ms. Meaden's employment was

terminated. It appears that some weeks later, on June 25, 1981 the Occupational Health Branch conducted an inspection of Mr. Swartz's premises for the express purpose of assessing the exposure of hydrogen cyanide in the stripping operation. The resulting report contains the following account:

The stripping operation is done in a 500 Ml. stainless steel beaker and is located in a washroom which measures about 9ft x 6ft x 10ft. The washroom has exhaust ventilation via a 4" x 9" ceiling duct. Ventilation measurements showed a face velocity of 100 f.p.m. and a total exhaust air flow of 27 c.f.m. During stripping operations the door to this room is left open ...

The presence of hydrogen cyanide (hydro cyanic acid) was determined using Drager detector tubes and was found to be 100 ppm at the stripping solution surface before stripping operations were started ...

During stripping operations, it was found that the concentration of hydrogen cyanide (hydro cyanic acid) in the worker's breathing zone was below the detection level of the Drager tube used, i.e. less than 2 ppm.

Immediately after stripping operations were finished, the presence of hydro cyanide (hydro cyanic acid) was determined using Drager detector tubes in the washroom, the corridor outside the washroom, and in the workshop. In all three cases the concentration was below the detection limit, i.e. less than 2 ppm.

16. In short, the inspection conducted at that time, in conditions apparently similar to those experienced by Ms. Meaden on the day before her employment was terminated, indicate no significant danger. That determination does not, however, dispose of the complaint. The ultimate issue is whether the complainant had grounds to believe she was in danger and was therefore exercising her rights under the Act When she reused to perform the electro-plating work.

17. The first issue to be determined is whether Ms. Meaden quit or was discharged. If she was not discharged, disciplined or otherwise threatened by her employer there can be no grounds for complaint under the *Occupational Health and Safety Act*. Having regard to the totality of the evidence, it is clear that in her confrontation with Mr. Swartz on her last day of work Ms. Meaden was given little or no choice. There can be no doubt on the evidence that Mr. Swartz's statement to his employee was in effect "these are the conditions under which you must work, take it or leave it". The Board is satisfied that when that statement was put to Ms. Meaden she believed, on the strength of the medical evidence then available to her, that to continue to work in the conditions required by Mr. Swartz would jeopardize her health. In these circumstances it would be most unrealistic to conclude that she voluntarily quit; we are satisfied that in fact she was constructively discharged at that time. (cf. *Re Welmet Industries Limited and United Steelworkers* (1980) 28 L.A.C. (2d), 84; and see, generally, Christie, *Employment Law in Canada* (Toronto 1980) at p. 335.) We therefore conclude that Ms. Meaden was discharged.

18. The issue then becomes whether Ms. Meaden's discharge was contrary to the *Occupational Health and Safety Act*. Article 23, provides, in part, as follows:

(3) A worker may refuse to work or do particular work where he has reason to believe that,

- (a) any equipment, machine, device or thing he is to use or operate is likely to endanger himself or another worker;
- (b) the physical condition of the work place or the part therefore in which he works or is to work is likely to endanger himself; or
- (c) any equipment, machine, device or thing he is to use or operate or the physical condition of the work place or the part thereof in which he works or is to work is in contravention of this Act or the regulations and such contravention is likely to endanger himself or another worker.

(4) Upon refusing to work or do particular work, the worker shall promptly report the circumstances of his refusal to his employer or supervisor who shall forthwith investigate the report in the presence of the worker and, if there is such, the presence of one of,

- (a) a committee member who represents workers, if any;
- (b) a health and safety representative, if any; or
- (c) a worker who because of his knowledge, experience and training is selected by a trade union that represents the worker, or if there is no trade union, is selected by the workers to represent them,

who shall be made available and who shall attend without delay.

(5) Until the investigation is completed, the worker shall remain in a safe place near his work station.

(6) Where, following the investigation or any steps taken to deal with the circumstances that caused the worker to refuse to work or do particular work, the worker has reasonable grounds to believe that,

- (a) the equipment, machine, device or thing that was the cause of his refusal to work or do particular work continues to be likely to danger himself or another worker;
- (b) the physical condition of the work place or the part thereof in which he works continues to be likely to endanger himself; or
- (c) any equipment, machine, device or thing he is to use or operate or the physical condition of the work place or the part thereof in which he works or is to work is in contravention of this Act or the regulations and such contravention continues to be likely to endanger himself or another worker,

the worker may refuse to work or do the particular work and the employer or the worker or a person on behalf of the employer or worker shall cause an inspector to be notified thereof.

19. The Act also prohibits any interference by the employer with the rights of an employee described above. Article 24, subsection 1 provides as follows:

24.-(1) No employer or person acting on behalf of an employer shall,

- (a) dismiss or threaten to dismiss a worker;
- (b) discipline or suspend or threaten to discipline or suspend a worker;
- (c) impose any penalty upon a worker; or
- (d) intimidate or coerce a worker,

because the worker has acted in compliance with this Act or the regulations or an order made thereunder or has sought the enforcement of this Act or the regulations.

20. Counsel for the respondent submits that in this instance Ms. Meaden should have simply refused to work and then called for an inspection of the stripping operation as contemplated in the procedures set out in section 23 of the Act. Ideally that is what should have happened. It was equally open, however, to the respondent to call for an inspection when the difference arose between himself and his employee respecting the safety of working conditions. More importantly, Ms. Meaden's ability to call for an inspection or do anything else was effectively cut off by the response of Mr. Swartz which, as we have found, amounted to a constructive discharge. In practical terms, she was fired after she refused to perform the stripping work and before she could pursue her rights any further. In those circumstances the employer should not be heard to object that she should have done more.

21. Under the Act it was the complainant's first right to refuse to do the stripping work if she had "reason to believe" that the physical condition of the work place was likely to endanger her. We have no difficulty concluding, given the ill effects which she felt the day before and the medical diagnosis obtained, that she had grounds for that belief. Once she reported her refusal to Mr. Swartz he had an opportunity to investigate and communicate his own view. In this case there was little need for an investigation as both Mr. Swartz and Ms. Meaden were well aware of the facts that were the basis for her objection. At that point, therefore, when Mr. Swartz expressed his disagreement with Ms. Meaden in the light of his knowledge of the situation and his experience in the contemplation of section 23, subsection 6 of the Act, she had a second right to refuse to do the work as long as she had at that point "reasonable grounds" to believe that it was unsafe.

22. In our view at the time that Mr. Swartz registered his disagreement, emphasizing his experience of how things are done in the jewellery industry, Ms. Meaden nevertheless did have reasonable grounds to believe that the equipment and the physical condition of the work place were likely to endanger her. In addition to the ill effects which she had experienced the day before, she had the advice, whether or not it was justified, of a former teacher and an officer of

the Occupational Health Branch that the circumstances seemed irregular and dangerous. She also had the experience from her own community college training and apprenticeship in another jewellery shop which suggested that the stripping process as set up in the respondent's washroom did not have adequate ventilation. We cannot conclude that in these circumstances she should have been entirely persuaded by her employer's arguments about his own experience and judgement in the matter. Given the seriousness of the possible consequences of a mishap involving hydrogen cyanide gas we must conclude that Ms. Meaden did have reasonable grounds for concern at that time.

23. The fact that a subsequent Ministry inspection of the premises might have confirmed that Swartz was correct (a conclusion we expressly do not make absent adequate evidence respecting the functioning of the ventilation system in the building on the two respective days in question) does not diminish Ms. Meaden's rights on the date of her discharge. At that time she was entitled to refuse to work pending a resolution of the disagreement between herself and her employer. Her abrupt discharge by Mr. Swartz effectively deprived her of the ability to pursue such further rights as she might have under section 23. In other words, by dismissing her prematurely for her refusal to do the plating and stripping work the employer foreclosed any opportunity that she might have to realize the protections of the Act. Her refusal to work out of fear for her safety is a right that she had under the Act; we can draw no other conclusion than that she was discharged because she chose to exercise that right. We must therefore find that the respondent has violated section 24(1)(a) of the *Occupational Health and Safety Act*.

24. The Board therefore orders that the respondent pay compensation to Ms. Meaden for wages and benefits lost from the date of her discharge to the date of this order, with allowance for normal mitigation of damages including such wages and benefits as may have been earned elsewhere. The Board remains seized of this complaint in the event the parties are unable to agree on the amount of compensation.

DECISION OF BOARD MEMBER W. G. DONNELLY:

The decision of Board Member W. G. Donnelly to follow at a later date.

0859-81-U Canadian Textile & Chemical Union, Complainant, v. Albert Sliwinski Ltd. c.o.b. as Avon Sportswear, Respondent.

Interference in Trade Union – Unfair Labour Practice – Employer receiving complaints that complainant harassing employees to support raiding union – Complainant issued written warning - Whether discipline motivated by anti-union sentiment

BEFORE: N. B. Satterfield, Vice-Chairman and Board Members W. H. Wightman and H. Simon.

APPEARANCES: Laurel Ritchie, Manuel Cruz and Jack DiPrima for the complainant; D. Wakely and A. Sliwin for the respondent.

DECISION OF THE BOARD; November 20, 1981

1. This is a complaint under section 89 of the *Labour Relations Act* alleging that the grievor, Manuel Cruz, was dealt with by the respondent contrary to the provisions of sections 64, 66, 70 and 80 (formerly sections 56, 58, 61 and 71) of the Act. The complaint arises as the result of a written warning issued by the respondent to the grievor on July 8th, 1981. The complainant contends that the written warning was issued because of Cruz' membership in and support of the complainant. The complainant is seeking, by way of relief, that the written warning be rescinded and that it be removed entirely from the employee's record.

2. The complainant, in support of its claim that the written warning was issued because of Cruz' membership in and support of the complainant, has alleged that Mr. Albert Sliwin, president and owner of the respondent did:

- (a) speak to Cruz and another employee, Jack DiPrima, together on June 4th and accused them of having employees sign applications for membership in the complainant under false pretences and that he told Cruz and DiPrima to remain members of the United Garment Workers of America ("the Garment Workers"), the union which at that time was bargaining agent for the respondent's employees;
- (b) shortly after speaking to the two employees on June 4th, call a meeting of all employees on working time and repeat to the meeting his accusation about the two employees' activities; state that the Garment Workers would continue to represent some employees in the plant even if the complainant was certified and that lay-offs and firings could follow were the complainant to be certified; and
- (c) threaten the employment security of Cruz on July 8th by referring, after giving him, the written warning, to the prior termination of re-employment without compensation of DiPrima.

3. The facts set out hereunder are derived from the testimony of Sliwin, DePrima, Cruz and James Goulding. Goulding is shop steward for the Garment Workers and a member of its negotiating committee which was engaged in negotiating with the respondent for the

renewal of a collective agreement during most of the times material to this complaint. There were some inconsistencies and differences in the evidence of the witnesses for the respondent and the complainant and the findings of fact reflect the Board's assessment of all of that evidence, the reliability of the witnesses' recollection of events, their demeanor and relative credibility.

4. The respondent has been in the business of manufacturing sportswear for more than twenty years. It employed some 400 employees at the time of the complaint. For the vast majority of these employees English is not their first language. According to Sliwin, the languages spoken in the plant by the employees reflected most of the languages spoken today in Metropolitan Toronto. The United Garment Workers of America, as noted above, is the current bargaining agent for these employees and has been for the past three years. The complainant began an organizing campaign amongst these employees at the beginning of June 1981 in order to attempt to displace the Garment Workers as their bargaining agent.

5. Early in the complainant's campaign Sliwin received complaints from some of the female employees that Cruz and DiPrima had approached them to sign something to do with another union under what the employees thought were false pretences. Sliwin was annoyed by the complaints because he saw them as disruptive of his work and of the operations. He confronted Cruz and DiPrima with the fact that he was receiving complaints and the nature of the complaints as they had been made to him. They denied that they had been doing anything which would mislead employees so he told them to stop whatever it was that they were doing which was causing the complaints. Sliwin allows that he concluded from the complaints that the two employees were supporters of the complainant, but the Board is satisfied from DiPrima's evidence that Sliwin did not try to influence the two employees' support for the complainant. DiPrima admitted that Sliwin did not attempt to talk them out of supporting the complainant, he just told them to stop doing whatever it was that was bothering other employees.

6. Some time within the next half hour Sliwin was addressing a meeting of all employees which he had announced over the plant's "intercom" system. He told the meeting that he had received complaints from employees that they were being asked to sign something for a union under what they believed were false pretences. He told the meeting that the complaints were interfering with work and that he was not prepared to cope with them. He cautioned the employees that, if they were being asked to sign something, to be sure they knew what it was before they signed it and not to come complaining to him after the fact because there would be nothing that he could do about their problems. The evidence is conclusive that Sliwin did not refer by name to either the Garment Workers or the complainant, nor did he refer by name to Cruz or DiPrima. In fact Sliwin told the employees, according to DiPrima, that he did not care what union represented them.

7. There was no further problem with respect to Cruz after that meeting until July 8th, the date on which the written warning was issued to him. That morning, four employees complained to Goulding that Cruz was bothering them to vote against the settlement terms which had been negotiated between the Garment Workers and the respondent and they asked Goulding to stop Cruz from bothering them in this manner. Goulding decided that this was a complaint between employees and not a complaint between employees and the employer, the type of complaint which he was accustomed to dealing with. He surmised that Cruz would more likely pay attention to Sliwin than to himself. Therefore he contacted Sliwin's secretary

and arranged to see Sliwin that same morning. Goulding left Sliwin's office after having related the employees' complaint to him. Sliwin responded by calling Cruz to his office and issuing the written warning to him. When Cruz asked why he was getting the written warning, Sliwin told him that there had been further complaints of him bothering employees. Cruz denied that he had done anything and inquired as to who had made the accusations. When Sliwin told him that the complaints had been made to Goulding and that Goulding had related them to him, Cruz asked Sliwin to call Goulding in. Sliwin did so immediately and Goulding repeated the complaints just as he had related them to Sliwin.

8. These facts establish to the Board's satisfaction that Sliwin was responding to complaints emanating from his employees when he spoke to Cruz and DiPrima on June 4th, when he spoke to the employees at the meeting he called shortly thereafter and again on July 8th when he issued the written warning to Cruz. Sliwin did not tell or otherwise indicate to Cruz and DiPrima either when he was speaking to them directly on June 4th or when he was speaking to the employees at the meeting that they should stop their activities in support of the complainant. While it is equally clear that he did tell them to stop doing whatever it was that was causing employees to complain to Sliwin, there is no evidence from which the Board is prepared to infer that this was a veiled threat to cease their activities on behalf of the complainant. Sliwin called the June 4th meeting of employees for the purpose of advising them that he was receiving complaints from some employees who were claiming that they were being misled into signing some document for a union. He cautioned them that, if they were being asked to sign anything, to be careful to know what it was and not to come complaining to him afterwards since he would be unable to help them and he was not prepared to cope with a lot of complaints. The complainant's evidence about this event not only does not establish any contravention of the Act, it corroborates the evidence of Sliwin and Goulding that Sliwin said nothing at the meeting about either union and he limited his remarks to the cautionary statements just referred to. When complaints about Cruz surfaced anew on July 8th, Sliwin responded to the complaints as related to him by Goulding with the written warning which was issued to Cruz. He did so because he believed from what Goulding had told him that Cruz was the cause of these renewed complaints.

9. While these facts, in the Board's view, show Sliwin to have acted impetuously and to have over-reacted to the complaints, his reactions are not so out of proportion to the nature of the complaints as to cause the Board to infer that his actions were motivated, even partially, by anti-union sentiment. Since there is no direct evidence that Sliwin holds anti-union views and there is no other no other evidence from which the Board could make that inference, the Board is satisfied that the respondent issued the written warning to Cruz for the reasons stated and those reasons did not include any anti-union motive.

10. Accordingly the complaint is dismissed.

11. Respondent counsel had taken a preliminary position that the Board should dismiss the complaint because it failed to disclose any cause of action, or in the alternative, if the Board heard and dismissed the complaint, counsel asked the Board to find that the complaint was so frivolous and without merit as to be an abuse of the Board's process and for that reason urged the Board to award costs against the complainant as a deterrent to such abuses. the Board's long-standing general practice is not to award costs against an unsuccessful applicant. Even were the Board prepared to do so in a case of flagrant abuse, it would not do so in this case. For, while the Board has found the complaint to lack sufficient merit to succeed, the Board does not find it so lacking in merit as to be a flagrant abuse of the Board's process. Therefore the Board declines to assess costs against the complainant as requested by respondent counsel.

0688-77-R Canadian Union of United Brewery, Flour, Cereal, Soft Drinks and Distillery Workers, Applicant, v. Brewers' Warehousing Company Limited, Respondent

Employee – Practice and Procedure – 1949 certification excluding store managers from unit – Exclusion continued in successive collective agreements – Present application seeking separate unit of store managers – Whether *res judicata* – Whether changes to section 1(3)(b) causing Board to consider managerial issue anew

BEFORE: Rory F. Egan, Vice-Chairman, and Board Members M. J. Fenwick and E. J. Brady.

APPEARANCES: *Paul Cavalluzzo, Allan Millard, J. Cameron Nelson, Jack Weir and Gordon Plenderleith for the applicant; Keith Billings, R. E. Rogers, C. V. Jones and J. R. Beattie for the respondent.*

DECISION OF RORY F. EGAN, VICE-CHAIRMAN, AND BOARD MEMBER E. J. BRADY; November 18, 1981

1. This is an application for certification in which the applicant seeks to be appointed bargaining agent for all store managers of retail outlets of the respondent in Windsor, Amherstburg, Belle River, La Salle and Tecumseh.
2. At the time of the application the applicant was the bargaining agent for employees of the respondent in its stores in the above areas. This is still the case.
3. The predecessor of the applicant had been certified by the Board in 1949 for a bargaining unit of all employees in the retail stores "save and except store managers". The exclusion of the store managers followed upon the report of an examiner appointed by the Board to inquire into the duties and responsibilities of store managers. The details of the report are not before the present panel, although it would appear that submissions were made to the Board on the report.
4. Collective agreements negotiated by the predecessor to the applicant and the applicant since 1950 have all carried the exclusion of store managers.
5. The present application, as already noted, now seeks certification of these managers in their own bargaining unit.
6. A Labour Relations Officer was appointed by the Board on August 16, 1977 with respect to the present application with instructions to inquire into and report to the Board on the composition of the bargaining unit and, in particular, upon any changes in the duties and responsibilities of store managers since 1949.
7. The respondent opposes the application on the grounds that all store managers affected by the application exercise management functions and are employed in a confidential capacity in matters relating to labour relations and, accordingly, pursuant to the provisions of section 1(3)(b) of the *Labour Relations Act*, are not employees for the purposes of the Act.

8. The respondent further submits that the applicant should be required to show cause why the Board should entertain the application, since the prior application in 1949 sought to include these persons in the bargaining unit and the Board excluded them. It is the respondent's submission that the application should be subject to the Board's policy regarding applications under section 106 of the *Labour Relations Act*. The applicant, on the other hand, argues that by reason of a change in the law and the facts, the doctrine of *res judicata* or doctrine analogous thereto ought not to be applied by the Board in the present circumstances.

9. The question of *res judicata* with respect to decisions of the Board is fully discussed in *Oakwood Park Lodge*, [1980] OLRB Rep. Oct. 1501. In that case the Board stated at paragraph 22:

....From a common sense or practical point of view (and apart altogether from legal questions concerning onus or *res judicata*) the Board is unlikely to reach a different conclusion on an issue such as employee status unless there has been a change in the law or a significant change in an individual's duties and responsibilities since the matter was last considered.

10. In 1949 when the applicant was certified for a bargaining unit excluding store managers, the Act excluded from the category of employee, managers, superintendents, persons who exercised management functions and persons employed in a confidential capacity in matters relating to labour relations. The Act at the date of this application no longer excludes the first two categories by name, and contains only the two latter exclusions as set out in section 1(3)(b), that is, no person shall be deemed to be an employee who, in the opinion of the Board, exercises managerial functions or is employed in a confidential capacity in matters relating to labour relations.

11. In *Canadian General Electric Company Limited*, [1978] OLRB Rep. April 384, and [1979] OLRB Rep. Jan. 12, the Board said in paragraph 16 and 17:

16. The statutory changes to section 1(3)(b) dictate that the Board not be inextricably bound by the decisions made 24 years ago and that it look anew at the duties and responsibilities of the cost estimator and cost analysts. As an administrative tribunal, the Labour Relations Board was established to respond efficiently and with expertise to ever-changing labour-management problems. To insist on the finality of a Board decision in the face of the statutory changes would be to elevate the reliance interest of the employer beyond both proper and necessary proportions and risk sacrificing equitable treatment for this applicant and the persons it seeks to represent.

17. In view of the Board's decision on the law as applied to section 1(3)(b) of the Act, it is unnecessary for the purpose of the plea of *res judicata* to inquire into whether or not there has been a change in the duties and responsibilities of the cost estimators over the last 24 years. We turn, therefore, to consider whether the cost estimators and cost analysts exercise managerial functions within the meaning of section 1(3)(b) of the Act.

In the present instance we are, of course, dealing with a decision made in 1949. We propose to follow the same procedure as that indicated in the above-noted case.

12. In the Windsor area stores of the respondent, there are three types of employees, namely, regular employees, probationary employees and temporary employees. In addition, there is the store manager.

13. The Labour Relations Officer's report in this matter comprises some 800 pages of evidence. Some of this evidence is contradictory, some is vague as might be expected with respect to the situation as it existed about 30 years ago, and some is obviously self-serving. One thing that is constant throughout the evidence is that the store managers have the power to and do hire temporary employees for their particular stores. Some temporaries are hired by the Windsor Group Office of the company, but that does not detract from the fact that the store manager has full authority when the need arises to hire people off the street.

14. The hiring of temporary employees is of significance because service as a temporary employee for a time specified can lead to the advancement of the temporary to the status of permanent employee. The temporary employee status provides the entrance into the bargaining unit of which it is part. The control of the temporary employees' qualifying time lies entirely within the hands of the store manager who hires him. In the process of hiring temporaries the store manager conducts interviews and checks references. In addition, the store manager has the authority to "phase out" a temporary employee whom he does not think will make a regular employee. The "phasing out" may not be equivalent to the power of discharge, but it effectively controls the fate of the employee and his employment relationship with the company, at least insofar as his potential for regular employment is concerned. The "phasing out" prevents the accumulation of the necessary service time to gain entrance to the regular jobs.

15. It is the duty of the store manager to schedule the hours of work in his store. This is a sensitive area and one giving rise to conflict between the bargaining agent and the store managers. This is apparent from the evidence of one of the applicant's witnesses, Mr. Woodman, who was chief steward for the stores. He indicated that part of his role in that office was to advise the cashier, a member of the bargaining unit, on problems the latter might have with the store manager with respect to the staffing of the stores — the manager's failure to call people in and the failure to schedule enough hours. Mr. Tomolillo, President of the local union, make it plain that the reduction of bargaining-unit hours by the managers of the stores is a matter of concern to the union. The conflict puts beyond dispute the fact that the scheduling of work is an important function performed by the store managers which goes to the roots of the employment relationship.

16. The managers are required to submit to head office an evaluation or appraisal of temporary employees in which is indicated the manager's opinion of the suitability of the temporary employees for employment as regulars. The evidence of the Windsor Group Manager is that these evaluations comprise effective recommendation in the making of decisions as to whether to make a temporary into a regular employee.

17. That these evaluations are important is indicated in a portion of the testimony given by Mr. Tomolillo before the Labour Relations Officer, which was relied upon by the respondent. The extract is as follows:

"... Mr. Rogers called me one day to ask my opinion on a temporary named Ted Steel and he told me that he'd had complaints from a couple of managers on him and what did I think of him and I told him that I'd seen better temporaries than Ted Steel and he consequently asked me to make out the evaluation form on Ted Steel, I refused ... I refused at that particular time because Ted Steel ... if I'd given him a formal evaluation report and I couldn't really give him a good one at the time, as Vice-President, I'd be giving him sort of the 'kiss of death' on that basis I refused to make it out and Mr. Rogers told me that I was in charge of the store and I had to make it out, that I'd made them out many times before and we argued over it but I still refused to make it out I told him that, you know, he's had complaints from two other managers ... let the two other managers make up the report on him."

18. Not only does the foregoing establish the importance of evaluations, but even discounting the fact that at the time Mr. Tomolillo was Vice-President of the Union while in charge of the store, and considering the situation had he been a rank-and file member of a union, the conflict in loyalties inherent in the situation as proposed by the applicant becomes apparent.

19. In addition to the foregoing duties, the store manager supervises the employees in his store. He can authorize overtime and apparently casual time off. He is responsible for the physical appearance of the store, and is authorized to have minor repairs, painting, grass-cutting and similar small contracts carried out. His appointment as manager is publicized by letter, and his designation as manager is made known to the public by a plaque displayed in the store. He is also the recipient of confidential reports dealing with arbitration decisions, productivity, damages, errors, cash loss, absenteeism, etc. These are mailed to the manager's house and are marked "Personal and Confidential".

20. There was evidence that the stores are normally manned by three categories, that is, the manager, a retail checker/cashier and counter clerks. The evidence is that the cashier frequently relieves the manager and is "in charge" for protracted periods. The cashier is a member of the bargaining unit presently represented by the applicant. The cashier, when in charge, carries out the normal duties of the manager, but does not hire temporaries nor normally schedule work, and cannot, with impunity, alter the schedule or employ more temporaries than the manager has designated. The retail checker or cashier is paid a premium, not his regular rate, while replacing a store manager.

21. The evidence also is that normally the manager performs work in his store that is the same as that done by persons in the bargaining unit, and that this may occupy from 60% to 95% of his time. The fact, of course, cannot be overlooked that we are considering here small, individual and separated work units where the volume of managerial work, however necessary, must be light.

22. In any event, the Board finds, having regard to all of the evidence, and having taken into account the two factors referred to immediately above, that at the time of the application, the managers in the respondent's retail stores in the Windsor area applied for, exercised managerial functions within the meaning of section 1(3)(b) of the *Labour Relations Act*. That

being the case, it is unnecessary to deal with the question as to whether there has been any significant change in the duties of managers since 1949.

23. The application is accordingly dismissed.

DECISION OF BOARD MEMBER M. J. FENWICK;

1. I dissent from the decision of my colleagues.

2. The company operates 15 retail stores in the area covered by the application for certification. The area is referred to as the Windsor group. It is one of nine in the Western Ontario district.

3. At the time of application the union was bargaining agent for approximately 160 employees in the Windsor group. These are employees in the warehouse, distributing depot of the area, or at the retail stores.

4. Each retail store is normally manned by three classifications of employees — (1) manager, (2) retail checker/cashier, (3) counter-clerk. These are all engaged in bargaining-unit work including cleaning up, working the counter, taking empties, unloading beer from trucks, throwing in orders, opening and closing stores, taking stock and balancing.

5. During a normal work week the manager will be at the store for sometimes less than one-half of its hours of operation. When he is not there, the cashier or another employee is responsible for the store.

6. A managerial function means a decision-making function. The word “manager” connotes a person who has effective control over an organization. If a person is merely implementing a decision made by another and has little latitude to use independent discretion, he cannot be said to be exercising a managerial function.

7. It is clear in this case that each manager performs all aspects of bargaining-unit work. The manager spends up to 90 per cent of his time in such work. To the extent that a person only incidentally supervises employees while working beside them (i.e., the lead hand, the working foreman), section 1(3)(b) has no application.

8. The nature of the work performed in the stores is simple and is done by unskilled employees. As such, there is little need for supervision, work assignment, evaluation or training.

9. The nature of the business is important. The product sold is not determined by the manager. The price cannot be changed by the manager. He has no input in respect of profits, dividends, receivables and so on. He does not sign cheques on behalf of the company nor can he commit it to any expenditure beyond a few dollars. In essence, the manager controls the “petty cash” at the store. He can authorize clearing snow, repairing broken windows, and cleaning floors.

10. It is apparent that the “managers” in this case do not manage. Their authority is clearly circumscribed by the nature of the business. Their authority is further circumscribed by

the centralized control of the company and by the collective agreement. The company has established certain policies or guidelines which must be followed by the manager. These deal with such matters as annual forecasts, cash combinations and shortages, inventory control and hiring of temporaries. The collective agreement regulates such matters as vacations, leaves of absence, promotion within the bargaining unit, and hours of work.

11. In hiring and evaluating temporaries, the manager is not exercising independent discretionary powers, but is merely exercising incidental reporting functions. The initial reports of the manager are one of several factors taken into account by the decision-maker, the Group Manager.

12. The manager plays no role in grievance procedures. The first and second steps of the grievance procedure are handled by the Group Manager. The manager has no consistent exposure to confidential matters relating to labour relations. He has no access to the personnel records of the employee.

13. Because of the nature of the work, little or no training is required. If needed, a senior employee, including the manager, will do it. As well, there is little need for work assignment because of the nature of the work. The hours of work are scheduled by the manager or the cashier in consultation with each other. Apart from these two employees, the Group Office determines who will work the hours required.

14. In all matters governing the store operation, the manager is implementing the decisions made by others. Any decision-making authority he has must be exercised in pre-determined, circumscribed areas. In respect to temporaries he merely collates or gathers information for the Group Manager who ultimately makes any material decisions.

15. The manager does not have regular material involvement relating to labour relations. In essence, along with the cashier, he is a senior employee who has been given more responsibilities than others, because of his experience and knowledge. As such, I am not persuaded that he is excluded by section 1(3)(b) of the Act.

16. I concur with the applicant union's submission that the duties and responsibilities of the store manager have materially changed in the last 30 years. The store manager no longer manages in the sense referred to in the jurisprudence. Although the job title is the same, the facts have been changed.

17. Since the applicant does not have the required number of cards for automatic certification, I would have ordered a representation vote.

0644-81-R United Textile Workers of America, Applicant, v. **Catfish Calhoun Inc.**, Respondent, v. Group of Employees, Objectors.

Employee – Petition – Whether assistant foremen excluded as managers – Petition emerging after employee meeting called by employer – Whether originator's close association with management casting doubt on voluntariness.

BEFORE: N. B. Satterfield, Vice-Chairman and Board Members W. H. Gibson and H. Kobryn.

APPEARANCES: *R. Myslowka and V. Mustard for the applicant, E. M. Werner and J. C. Wiley for the respondent; C. Jodoin for the objectors.*

DECISION OF VICE-CHAIRMAN N. B. SATTERFIELD AND BOARD MEMBER W. H. GIBSON; November 17, 1981

1. This is an application for certification.

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3. The Board finds that the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act*.

4. The parties were agreed on a description of the appropriate bargaining unit, except for a dispute over how the first line of supervisory exclusions should be defined. The respondent claimed that two persons, Sandra McBain and Sandra McPherson exercised managerial function as assistant foremen. For this reason, the respondent had not included their names on the list which it filed with the Board and contended that the supervisory exclusion should be stated in terms of "assistant foremen and persons above the rank of assistant foreman". The applicant took the contrary position that these persons did not exercise managerial function, should be included within the bargaining unit and, therefore, the supervisory exclusion should be stated in terms of "foremen and persons above the rank of foreman". The parties were also in dispute as to whether another person, Chris Jodoin, exercised managerial function, it being the applicant's contention that she be excluded because she did and the respondent took the contrary position. A Board Officer was authorized to inquire into and report to the Board on the duties and responsibilities of these three persons. The Officer has made his report to the Board and the parties have made their submissions on the report and as to the conclusions which the Board should draw from it at a hearing which was scheduled for this purpose. The Board has now had the opportunity to consider the report and the submissions of the parties thereon and its findings are set out hereunder.

5. The respondent manufactures and sells specialty sportswear garments such as T-shirts, T-dresses and jogging suits. The employees who are encompassed by the bargaining unit in question are those engaged in the manufacturing operation. According to the evidence of Martin Myers, the president and owner of the respondent, there are three departments in manufacturing: cutting, sewing and printing and the heads of those departments report to a production manager who, in turn, is responsible to Myers. There is also a production co-ordinator who reports to the production manager and the three department heads report as

well to the production co-ordinator. The parties are agreed that it is the three department heads who would be excluded by the term "foremen" if that is the first line of managerial exclusions in the bargaining unit definition and the term "foreman" will be used hereafter to describe these positions. Those jobs are filled as follows: cutting, Aggie Yeaman; sewing, Betty Sammon and printing, Debbie McRae. There is also a night shift supervisor, Cathy Stephonovitch, but the evidence does not reveal to whom she reports. At the time the application was made, there were between 67 and 70 employees working on the night shift, the balance working the day shift. The three foremen appear to work day shift only and they do some production work as well as supervising employees. Yeaman spends on an average 25 per cent of her time doing such work.

6. Two of the three persons whose jobs are at issue, McBain and McPherson, were working on the night shift for approximately two weeks, including June 22nd, the date when this application was made, while Stephonovitch was on vacation. Between them, they supervised the night shift operation and the respondent claims that they were exercising managerial functions during this time. Since the work on the night shift was mainly sewing, McBain and McPherson took their direction from Yeaman who left instructions for them each shift either in writing or orally. These instructions indicated what work was to be done on the shift and, if there was going to be any problem about sufficient work, what should be done with the employees when there was not enough work. The evidence reveals that, at least on one occasion, when Yeaman had left instructions which indicated that there would likely be a shortage of work and what to do about it, she phoned in several times during the shift to give McPherson instructions.

7. While McBain stated that she and McPherson "more or less" made all of the decisions on the night shift, there is little evidence to indicate the nature of these decisions except as they related to the physical assignment of work and the supplying of the materials necessary for that work, in other words, expediting work orders. They did each sign a single sheet document dated June 22nd, 1981 listing the following ten responsibilities:

You are fully responsible for this shift.

This includes:

1. Work floor.
2. Placing of girls.
3. Deciding whether or not to send girls home.
4. Responsible for the key.
5. Making sure the doors are kept locked.
6. No one is allowed on the premises except staff.
7. Phoning Bomar for security reasons.
8. Allowing staff to work overtime if necessary.
9. Discipline staff.
10. You will be responsible for allowing people to go home on sick leave.

It may well have been a function of the brief time that they were on this particular assignment, but neither of them authorized employees to work overtime, granted time off or disciplined any one, although each felt that they had this responsibility. The evidence does indicate that they pointed out work incorrectly done to the offending employee and took the necessary steps

to have that work corrected. McPherson did attend a production meeting on one occasion, but took no active role in it. McBain did not attend any production meetings. They both did production work while working on night shift, McBain cut and sewed binding onto garments and McPherson cut binding and inspected work. She said that she had spent approximately half their time, on average, doing this kind of work while she was on the night shift. They were not paid any differently than other employees while they were supervising the night shift. McPherson was responsible for locking up the premises at the end of the shift and she had a key to the premises for this purpose.

8. For a three month period which ended between one and two months prior to the application date, McBain also worked on day shift assisting Yeaman with the "supervision" of the sewing department. This assistance took the form of distributing the work to the employees in the sewing department. Although she did have and exercised the authority to grant casual time off, the evidence makes it abundantly clear that she did not have any authority to hire, fire, promote, demote or discipline employees. Nor did she make recommendations in this respect. Her role of assisting Yeaman did not include the responsibility of replacing Yeaman whenever it was necessary for her to be absent from the sewing department, even for short periods of time during the day shift.

9. Jodoin worked as an inspector and filling customers orders. In this latter respect, she told employees which work was required to fill particular orders, especially rush orders, and sometimes this included bringing the work to the employees. As inspector, she checked the work at various stages to make sure it was done properly and when she found incorrect work, pointed it out to the responsible employee. According to the evidence of McBain, McPherson and one other employee, Jodoin would chastise employees when she found errors in work or if the work wasn't completed in time to fill the orders when needed. They also referred to Jodoin as their boss or supervisor, although they acknowledged that Yeaman was the person who did the hiring, disciplining, scheduling of work and was the person in charge of the sewing room. The evidence is unequivocal that Jodoin has no authority to hire, fire, promote, demote or discipline employees or participate in or carry out any of the responsibilities which are typically associated with managerial function.

10. When the responsibilities of McBain, McPherson and Jodoin are viewed in the context of the respondent's organizational scheme for the manufacturing operation the evidence is almost totally devoid of any indication that these three persons have any opportunity to exercise the kind of independent discretion which is usually associated with having effective control over the employees whom they are said to be supervising. In most respects, the evidence shows the work of all three persons to be more that of someone carrying out an expediting function and even while McBain and McPherson were supervising the night shift it would be difficult, on the evidence, to characterize their responsibility as anything more than that of a lead hand responsible for the quality and quantity of output of a group of employees. On these facts, the Board is not prepared to find that McBain, McPherson or Jodoin exercise managerial function within the meaning of section 1(3)(b) of the Act. Consequently all three persons are employees for purposes of the Act and are included in the bargaining unit proposed by the applicant.

11. Therefore, having regard to the agreement of the parties, the Board finds that all employees of the respondent at St. Catharines, Ontario, save and except foremen, those above the rank of foreman, office staff, wholesale sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period, constitute a unit of employees of the respondent appropriate for collective bargaining.

12. The lists filed by the respondent contain the names of 70 employees who are included in the bargaining unit described above. The applicant filed membership documents on behalf of 39 of the employees whose names appear on the employer's list. The applicant also duly filed the Board's Form 8, Declaration Concerning Membership Documents to substantiate its membership evidence. Therefore the Board is satisfied that more than fifty-five per cent of the employees of the respondent in the bargaining unit at the time the application was made, were members of the applicant on July 2nd, 1981, the terminal fixed for this application and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

13. While the applicant has filed sufficient membership documents to place it in a certifiable position, a timely statement in opposition to the application ("a petition") also has been filed. The petition contains the names of 27 employees whose names appear also on the employer's list. 19 of them had previously signed membership cards with the applicant. If the Board is satisfied that this statement expresses the voluntary wishes of the employees, this would normally cause the Board to exercise its discretion under section 7(2) of the Act to direct that a representation vote be held. As a result, the Board conducted its usual inquiry into the origin, preparation, circulation and filing of the petition with the Board.

14. The Board heard evidence about the petition and matters affecting it from Glenn Foster, who represented the objectors at the hearing, and Myers, who testified about a meeting of employees which he had called and at which he had addressed the employees. No evidence was called by the union, although it had sent a telex dated June 23rd, 1981 to the Board containing the following allegations that the respondent had violated the Act:

Re Application for Certification United Textile Workers of America and Calhoun Sportswear St. Catharines Ontario union charges respondent with violation of section 56 and section 58 sub section c of the *Labour Relations Act* respondent threatening employees with termination and or loss of jobs through plant closure because of union membership respondent called meeting for Wednesday evening to be held at the Parkway Inn St. Catharines for the purpose of interferring [sic] with employees freedom of choice.

15. The applicant sent its application to the Board by registered mail on June 22nd. On that same date Myers posted a notice informing the employees of a meeting which was to be held on Wednesday June 24th. The notice reads as follows:

Dear Staff,

A number of employees have asked me concerning the union organizing campaign which appears to have commenced once again in our Company. In continuing with my policy of keeping you informed of Company events which may affect you, I make the following report.

The Ontario Labour Law provides that each employee is free to join, or not to join, the Union of his or her choice. This means that no one, neither the Company nor the Union, shall interfere by intimidation or coercion

with your right to decide whether you wish to join or not join a Union. It is your *right* to make up your own mind.

The Law also permits me to express my views on this subject provided that there is no coercion or intimidation.

I ask you to consider what will happen if you choose to have a Union represent you.

1. No longer will you be able to deal directly with me or I with you concerning such matters as raises, promotions, lay-offs, or leaves of absences. You and I will always have to deal through your agent, the Union.

2. You will be required to pay Union dues of about \$2.75 per week whether you belong to the Union or not.

For a more complete discussion, I invite you to a meeting at the Holiday Inn at 7:00 p.m. Wednesday, June 24th.

While the Board's record shows that its notice to employees about the application was not posted until Thursday, June 25th, it is obvious from the applicant's cross-examination of Myers that he had been aware of some form of union activity because he had twice encountered the Canadian Director of the applicant on the respondent's property, once on June 16th and again on June 19th.

16. The meeting did take place as scheduled and was held at a local hotel. The evidence does not reveal how many employees attended and there is no evidence that any arrangements were made for the night shift employees to attend. Myers addressed the employees from a text which he had prepared for this purpose. He also had obtained legal advice on what he should and should not say. He spoke to the employees about past relationships in the shop and he expressed his opinion that, if the employees were represented by a union, those relationships would change because it would then be necessary for him and the employees to deal through the union. When Myers was asked what the employees might be able to do about the union, he explained that he was not permitted to discuss that subject with him. His reply to a question about whether the shop might close if the union came in was that he had too much invested in it to close it and it was his "bread and butter" just as much as theirs. He was eventually asked to leave the meeting and leave the employees to themselves when they became frustrated by his repeated explanations that he could not discuss many of the matters which they were raising with him. He left when requested and instructed other managers who were attending the meeting to leave with him.

17. Foster is one of the employees who could be included in the bargaining unit described above and has been an employee for approximately 2-3/4 years. During this time he has been the respondent's only shipper/receiver and at the time the application was made he was also responsible for all of the routine maintenance in the shop. He works from 8:00 a.m. to 4:00 p.m. and is one of only seven male employees in the respondent's operations. He admitted during cross-examination by the applicant, as did Myers, that he has periodically joined Myers and some of the other male employees for a beer after work. Foster was solely

responsible for the petition, but was assisted by Jodoin on two of the three days which he collected the signatures of the employees. All of the signatures were obtained over three days, the Friday, Monday and Tuesday immediately following the filing of the application. Some employees who were approached to sign the petition on Friday declined to do so. Jodoin assisted him on the Friday and Monday in identifying employees by name and that was her only role with respect to the petition.

18. Foster did not attend the meeting because, when the notice was posted, he was already committed for that evening. Since he had made a point of informing himself about what had taken place at the meeting by speaking with other employees, the Board acceded in the hearing to the agreement of the parties and allowed him to testify about what he had learned. He told the Board that he went the next evening to the home of an employee who had attended. He learned, amongst other things, that employees had started to sign some document. He found out that it was in the possession of another employee, went to see that employee and asked to see the document. He stated that he saw a document which was a "hodge-podge" of signatures, expressed his opinion that it was no good and told the employee that he was going to prepare and circulate a petition himself. He went home, telephoned Jodoin, told her that he had seen the document, repeated his views of it and told her of his intention to take up his own petition. She told him that employees had begun signing some document at the meeting after Myers and the other managers had left. While the Board is satisfied with Foster's evidence that he saw a document with signatures on it, the Board is not prepared to rely on his evidence that it was signed at the meeting because of the hearsay nature of that evidence.

19. When Foster told Jodoin that he intended to take up a petition he also enlisted her help because she knew most of the employees by name and he did not. Foster composed and typed the petition at home Thursday evening and took it to work the next day. The petition remained in his possession at all times until it was delivered to the Board. Friday evening, at approximately 6:45, Foster met Jodoin by prior arrangement outside of the side entrance to the shop which is the entrance used by the employees. They sat in Foster's truck which was parked at the front of the parking lot next to the respondent's property, some forty to fifty feet away from the door. This was the location at which signatures were obtained on all three days. No windows look out from the shop onto this area and the respondent's offices are at the front of the building. On the Friday evening, Foster stopped employees as they came outside on their supper break from the night shift. He showed them the petition and asked them whether they were willing to sign it. Some signed it there and some went into his truck to sign it. Some employees declined to sign it. On the Monday he and Jodoin stationed themselves again at the front of the parking lot. Jodoin was already there when Foster came out of the shop about ten minutes to three. Jodoin's shift ends at 3 p.m., but, according to Foster, she had left work right after lunch because her child was sick. Foster gathered signatures until about 3:15, stopping employees who were on their way in for the night shift as well as employees leaving after the day shift. Foster had worked through his usual lunch break that day, as he had done on Friday, and had punched out for his break when he went out to meet Jodoin. The nature of his work is such that he has to work through his normal lunch period from time to time and when this happens, he clocks out at a later time for lunch. On the Monday while Foster and Jodoin were getting signatures on the petition, Yeaman was standing some forty feet away. Jodoin rides to and from with her. Yeaman could see the employees who were being stopped by the other two.

20. Foster obtained the last signatures on Tuesday by himself, again posting himself at the front of the parking lot. The plant worked the next day, July 1st, because the holiday was going to be observed on the following Friday. During the day Foster was told that he would have to go into Toronto the next day to pick up some materials that were needed so he decided that he could deliver the petition to the Board himself and he did so. He told the Board that he had made alternative arrangements to have a relative deliver it for him if he was unable to go himself. It was also his evidence that he used to have a regular Wednesday and Thursday run into Toronto, but now goes only when specifically instructed to do so. Thursday was the terminal date for the application and therefore the last date for filing the petition with the Board.

21. The applicant is asking the Board to conclude that the petition does not represent a voluntary expression of the wishes of the employees who signed it. The applicant considers that conclusion to be warranted on the grounds that initiation of the petition was inspired by the meeting of employees which the respondent called; that it would be reasonable for employees to believe the petition had the respondent's support from the fact that on the Monday and Tuesday Foster was canvassing employees during times when he would ordinarily be at work and he was assisted by Jodoin on the Monday for a period of time when she normally would have been at work; that the employees, because of this appearance of respondent support for the petition, would sign in the belief it was the respondent's wish that they do so; and that the petition was signed by the employees because they feared that the respondent would learn whether they had signed it. The applicant argued that this would be a reasonable fear because of Foster's association with Myers over drinks after work and because of their perception of Jodoin as a boss and the fact that she rode to and from work with Yeaman.

22. The Board usually views with suspicion and concern a petition which emerges following a meeting of employees which has been called and addressed by the employer, as was the case here, because of the potential such meetings hold for interfering with the free expression of the employees' wishes. For this reason, the Board has paid close attention to the circumstances of how meetings are called and what transpires at them, particularly with respect to the employer's conduct. See *Mitten Industries Galt Limited*, [1975] OLRB Rep. Mar. 155. Nothing contained in the notice posted by the respondent about the meeting nor in the evidence about Myers' conduct at the meeting reveals the respondent to have violated the bounds of legitimate free expression permitted by section 64 of the Act. There is no evidence of Myers having made any threats or promises or to have made any disparaging remarks about the applicant. He followed a prepared text and avoided answering questions which he thought it not proper answer. However, as the Board pointed out in *Mitten Industries, supra*, when, following a meeting of employees called by the employer, a petition emerges to challenge the applicant's evidence of membership support, the issue is not whether the employer breached the Act but "... whether the evidence contradicting the union membership evidence can be relied on by the Board."... The Board went on to note that "It is quite possible that the employer's speech, although not unlawful, may still cast some doubt on the reliability of the employee petition." In that case the Board found that the meeting was called and held under circumstances which made it difficult for employees not to fail to attend without identifying themselves as not wishing to attend the employer's meeting. Thus the employee audience closely resembled a captive audience, an audience which is more susceptible to being unduly influenced by employer speeches. After examining the contents of the employer's speech, the Board found that it conveyed a clear message that the employer desired that a vote be held and

a less than subtle suggestion that this be achieved by means of an employee petition. Coupled with these findings were other remarks in the employer's speech and inconsistencies in the testimony of the petitioners which, the Board found, supported an inference that the employer expected the employees to respond to his wishes.

23. These circumstances are not present in the case at hand nor is there the kind of circumstances evident in those decisions reviewed in *New Ontario Dynamics Limited*, [1975] OLRB Rep. Nov. 845 which deal with the use of employee meetings as a means for threatening employees' job security. On the contrary, when Myers was asked what the employees could do about the union the uncontradicted evidence is that he refused to advise the employees. Moreover, he refused to discuss other matters raised by employees to the point that they became frustrated and asked him to leave. Thus he risked alienating any support which he may have had or hoped to muster. When he was asked whether the shop would close if the union got in, he assured the employees that it would not be closed. Not only is there no evidence that would support an inference that the meeting was called or organized in a way that the employees were a captive audience, the fact that the employees decided when the employer's participation in the meeting should be terminated and Myers complied with their decision suggests that they were not a captive audience.

24. The fact that the meeting was held prior to the Board's notice to employees being posted and that by the end of the day shift on the day after the meeting, the day on which the Board's notice was posted, a document which Foster viewed as a petition had already been in circulation, and the fact that shortly after seeing that document, Foster put into action his own decision to prepare and circulate a petition, leads the Board to conclude that the meeting spawned the petition. The Board is satisfied, however, on the evidence about what transpired at the meeting and the conditions under which it was called and held, that this event by itself does not cast doubt on the reliability of the petition as an expression of the employees' true wishes. It remains, therefore, to determine whether the association of Foster and Jodoin with the petition casts doubt on its reliability.

25. Turning first to the effect on the employees of Foster having been outside of the shop on the Monday and Tuesday soliciting signatures in support of the petition at a time when, in light of his scheduled hours of work, he should have been on the job, does this lead to the conclusion proposed by the applicant that the employees took this as a sign that the respondent supported the petition? While Foster took the precaution of punching out before he left the shop and while the Board finds no reason not to accept his explanation that he was merely taking a delayed meal break, the important question is what impression his conduct made on the employees' view of the petition. While that is a question which, in other circumstances, the Board would have to resolve, it is unnecessary to do so in the particular circumstances of this case. The first signatures were obtained on the petition on the Friday evening some three to four hours after the end of Foster's and Jodoin's normal daily hours. The signatures obtained on the Friday of employees who had previously signed cards for the applicant would, if proven to express the true wishes of those employees, be sufficient for the Board to rely on to exercise its discretion to direct a representation vote pursuant to section 7(2) of the Act. Therefore, even if all of the signatures obtained on the Monday and Tuesday were found not to be voluntary because of the employees' perception, that would not affect the signatures obtained on Friday. For the same reason it is unnecessary for the Board to determine the effect on the employees' perception of Jodoin's presence outside of the plant before the end of her shift on the Monday and Yeaman's proximity to Foster and Jodoin on that same day while they were approaching employees with the petition.

26. That leaves the question of whether the employees signed the petition either out of fear that the respondent would find out if they did not or because they thought they were doing what the respondent wished them to do, either because of Foster's after-hours association with Myers or because of the employees' perception of Jodoin and her relationship with Yeaman. Insofar as Foster's association with Myers is concerned, there is no evidence before the Board that the employees as a body were aware of that association. As the Board stated earlier in this decision, the evidence about Jodoin's duties and responsibilities unequivocally establishes that she has none of the authority usually associated with managerial function. That same evidence, in the Board's view, does not provide a reasonable basis for the employees to perceive her as a boss or as anyone who could materially influence their employment relationship with the respondent. Her only link with the respondent's management is the fact that she rides to and from work with Yeaman. Nor is there any evidence that the respondent had any alliance with petition supporters or in any overt way tried to promote the idea of a petition. There is the evidence, however, that at the meeting Myers refused to advise the employees on what action they could take to the point that he risked alienating them. Also, when asked, he assured them that the shop would not be closed, thus removing the most effective threat to employees' job security. In the Board's view, this evidence of the respondent's conduct had a countervailing effect on any potential influence to sign the petition which might ordinarily flow from the Foster and Myers association or from the employees' perception of Jodoin's relationship with Yeaman. Since Foster's and Jodoin's role in the petition was entirely appropriate for employees who are in the bargaining unit, the Board is not prepared to find that their respective relationship with Myers and Yeaman would have the result claimed by the applicant.

27. Therefore the Board is satisfied from the evidence in its entirety that the petition is a voluntary expression of the wishes of a sufficient number of those employees who signed it so as to put into question the right of the applicant to automatic certification.

28. Accordingly, the Board directs that a representation vote be held of all employees of the respondent at St. Catharines, Ontario, save and except foremen, those above the rank of foreman, office staff, wholesale sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period as the date hereof and who do not sever their employment or who are not discharged for cause between the date hereof and the date of the taking of the vote.

29. Voters will be asked whether they wish to be represented by the applicant in their employment relations with the respondent.

30. This matter is referred to the Registrar.

DECISION OF THE BOARD MEMBER H. KOBRYN;

1. The facts as stated in the decision by the majority of the Board in this case can be generally accepted with the minor additions that are listed below which outline the three bases and fundamental reasons why I reached a completely different conclusion than the majority.

- (i) Based on the evidence as presented by Mr. Martin Myers, the Company President, I have come to the conclusion that we have here a very street wise employer in this whole area of labour

relations and attempts made to organize his plant. Apparently this happened before. Same is confirmed in the first sentence of the letter the employer directed to the employees, calling them to a meeting he had arranged for Wednesday, June 24th.

“A number of employees have asked me concerning the union organizing campaign which appears to have commenced *once again* in our Company.”

Mr. Myers called this employee meeting even before he received a notice from the Board that an application had been made for certification. After speaking to the employees for nearly an hour, lo and behold there is a sudden change of heart among the employees and a petition is started that very evening while the employees are still gathered at the hotel where the meeting is held. This meeting which was called for the sole purpose of discussing the union's organizing campaign gave Mr. Myers ample opportunity to express his feelings on this very pressing subject matter.

- (ii) Mr. Glen Foster the originator of the second petition and the person who informed the employee who got the first petition signed that he felt it was not proper because it was a mumble-jumble of names. This first petition was started and circulated at the meeting which Mr. Myers had called on Wednesday, June 24th. Mr. Foster admitted under cross-examination that he socializes with Mr. Myers in that they meet outside the plant and drink together. Mr. Myers in his evidence qualified this by saying that Foster is one of seven males employed at the plant and he has a drink with the other males also. The information on this close relationship was a sufficient concern to the applicant in that the applicant's counsel raised this point at the hearing. In my humble opinion and based on the answers received from Mr. Foster to the questions asked, it can be concluded that the employees, especially the female employees perceived Mr. Foster as being closely aligned with the employer.
- (iii) Ms. Chris Jodoin the person who assisted Mr. Glen Foster with the petition. She was present on two days of signing to identify the employees. Four witnesses who were chosen by the employer to be interviewed by the Labour Relations Officer assigned to this perceived Chris Jodoin as been a boss, this is recorded in the Labour Relations Officer's report to the Board. The four witnesses were Sandra McBain,, Sandra McPherson, Carina Delamonica and Elaine Hildebrandt.

The two people who were the movers of this petition were perceived by the employees to be either closely aligned with the employer as in the case of Mr. Foster or perceived to be managerial as in the case of Ms. Jodoin.

Under the above given set of circumstances plus the other factors listed in the majority

decision; the signing of this document became a "safe" thing to do, rather than a voluntary change of heart.

2. For all of the above reasons I am of the opinion that this petition is not a voluntary expression of the wishes of those employees who signed it and should be dismissed and the applicant be given a certificate. This applicant presented membership evidence showing that more than fifty-five per cent of the employees of the respondent in the bargaining unit at the time the application was made, were members of the applicant on July 2nd, 1981, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

0441-81-R Operative Plasterers' and Cement Masons' International Association, Local 172, Applicant, v. **Clifford Masonry Limited**, Respondent, v. Labourers' International Union of North America, Local 506, Intervener.

Abandonment – Certification – Construction Industry – Whether collective agreement bar – Whether intervener abandoned bargaining rights with respect to masonry restoration

BEFORE: N. B. Satterfield, Vice-Chairman and Board Members J. Wilson and H. Kobryn.

APPEARANCES: L. Arnold, S. Stewart and A. Enman for the applicant; R. D. Perkins and James Briach for the respondent; S. M. Grant and P. Hitchen for the intervener.

DECISION OF THE BOARD; November 5, 1981

1. This is an application for certification, construction industry.

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3. The Board finds that the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act*, and is an affiliated bargaining agent of designated employee bargaining agency. Pursuant to the designation issued by the Minister under section 139(1) of the Act, on April 27, 1978, the designated employee bargaining agency is the Operative Plasterers and Cement Masons International Association of the United States and Canada and the Operative Plasterers and Cement Masons International Association of the United States and Canada, Local 172.

4. The Board further finds that this is an application for certification within the meaning of section 119 of the *Labour Relations Act* and is an application made pursuant to section 144(1) of the Act which provides that:

An application for certification as bargaining agent which relates to

the industrial, commercial and institutional sector of the construction industry referred to in clause e of section 117 shall be brought by either,

- (a) an employee bargaining agency; or
- (b) one or more affiliated bargaining agents of the employee bargaining agency,

on behalf of all affiliated bargaining agents of the employee bargaining agency and the unit of employees shall include all employees who would be bound by a provincial agreement together with all other employees in at least one appropriate geographic area unless bargaining rights for such geographic area have already been acquired under subsection 3 or by voluntary recognition.

5. The application describes the bargaining unit for which the applicant is seeking to be certified in the following terms:

“All employees of the respondent engaged in restoration work in the industrial, commercial and institutional sector of the construction industry and all other sectors of the construction industry, in the Province of Ontario, save and except non-working foremen and those above the rank; and save and except those employees covered by existing collective agreements”.

6. The respondent's reply asserts that all of its employees engaged in restoration work at the projects affected by the application are covered by the provisions of "... the Provincial Labourers' Collective Agreement and the Provincial Bricklayers' Collective Agreement ...". On those grounds, the respondent requested that a hearing be held into the application and contends that the application should be dismissed.

7. The intervention filed by the intervener also requested that a hearing be held into the application on the grounds that:

- (a) it was filing a separate application for certification on behalf of the employees in the bargaining unit proposed by the applicant and was requesting that its application be consolidated with the instant one; and
- (b) it claims exclusive jurisdiction over the work in question and therefore should be certified as the bargaining agent for the employees who perform that work.

Subsequent to filing its intervention and prior to the hearing held into this application, the intervener claimed, in a letter addressed to the Board, that the intervener and respondent were bound to a collective agreement which was a bar to the application for certification.

8. Accordingly, a hearing was held into the application for the purpose, *inter alia*, of receiving the evidence and representation of the parties on those matters raised in the

respondent's reply and the intervener's intervention. At the hearing the applicant acknowledged that there was a craft unit of bricklayers in the employ of the respondent whose bargaining rights were held by the International Union of Bricklayers and Allied Craftsmen and its Ontario Provincial Conference. While the intervener pursued, as its primary position at the hearing, its claim that a subsisting collective agreement to which it and the respondent were bound was a bar to this application, it also repeated its request that its application for certification in Board file #0580-81-R be treated as though it had been brought on the same day as this application. The Board heard the representations of the parties in respect of this latter request of the intervener and reserved its decision pending resolution of the alleged collective agreement bar to this application.

9. It was the position of both the intervener and the respondent at the hearing that they have been parties to or bound by a collective agreement since 1969. It was the respondent's evidence that it extended voluntary recognition to both the International Union of Bricklayers and Allied Craftsmen, Local 2 and the intervener when it began business in 1969, although no collective agreements were entered in evidence to corroborate this claim. The evidence does reveal, however, that the respondent and intervener had been bound to a collective agreement in the residential sector of the collective agreement in effect from May 20th, 1974 to April 30th, 1976. There is evidence before the Board in the form of a memorandum of understanding between the intervener and the respondent dated August 11, 1980 which purports to relate to a "Residential Masonry Agreement". While the parties may be bound to a collective agreement in the residential sector, the evidence before the Board is inconclusive of whether the parties are bound to such an agreement and the Board makes no finding either way. The respondent and intervener had been bound also to a collective agreement between the General Contractors' Section of the Toronto Construction Association and the Labourers' Union of North America, Ontario Provincial District Council effective August 4th, 1972. This agreement described the intervener's bargaining rights in terms of all labourers employed in Board area #8 in the industrial, commercial and institutional sector of the construction industry. It also contained a clause restricting the respondent's right to sub-contract work coming within the scope of those bargaining rights. The respondent understood that he was required to sub-contract such work only to other contractors which were in a collective bargaining relationship with the intervener. That agreement was still in effect on February 18th, 1975, when the Board certified the General Contractors Section of the Toronto Construction Association as the accredited bargaining agent for all employers of employees for whom the intervener held bargaining rights in the industrial, commercial and institutional sector of the construction industry. The respondent is named in the accreditation order as being an employer of employees for whom the intervener held such bargaining rights. Those bargaining rights of the intervener are now contained in the current Provincial Collective Agreement ("the Agreement") between the labourers employer bargaining agency and the labourers employee bargaining agency. The employer bargaining agency is comprised of the following associations, the Labour Relations Bureau of the Ontario General Contractors Association; Ontario Masonry Contractors Association; Industrial Contractors Association of Canada; Waterproofing Contractors Association of Ontario; and the Concrete Floor Contractors Association of Ontario, referred to collectively in the agreement as the E.B.A.. The employee bargaining agency is The Labourers' International Union of North America and the Labourers' International Union of North America, Ontario Provincial District Council. The employee bargaining agency acts on behalf of its affiliated local unions, of which the intervener is one, and collectively the employee bargaining agency and its affiliated local unions are referred to in the Agreement as the Union.

10. Article I — Recognition of the “master portion” of the Agreement describes the bargaining rights of the parties in the following terms:

1.01 The E.B.A. recognizes the Union as the sole and exclusive bargaining agent for all construction labourers, including masons’ or bricklayers’ tenders, plasterers and plasterers’ apprentices and all employees engaged in cement finishing, waterproofing or restoration work and all other construction Employees engaged in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, for whom the Union has bargaining rights.

1.02 The Union recognizes the E.B.A. (the several parties are listed on Schedule “C”) as the sole and exclusive bargaining agent for all Employers whose Employees are represented by the Union and for whom the Union has bargaining rights who are engaged in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario.

1.03 The Employer recognizes each Local Union as specified in the attached Schedule “A” to be the administrative party of this Collective Agreement for work performed within the geographical area and/or jurisdiction of the Local Unions as defined in Schedule “B” attached hereto.

1.04 This agreement shall also apply to an employer in all other sectors where the Union or any of its affiliated bargaining agents have bargaining rights in such other sectors for the Employees of such Employer, provided that such Employer may become signatory to the various Collective Agreements applicable in such other sectors.

The predecessor provincial agreement, which was the first one under province-wide collective bargaining, is not in evidence. It was the intervener’s uncontradicted evidence, however, that the wording of clause 1.01 was closely similar, if not identical to the wording of clause 1.01 above.

The Agreement then seeks to buttress its bargaining rights by the following provisions in Article 2 — Union Security, Work Jurisdiction, Assignment of Work, Subcontracting

2.01 The Employer agrees to employ only members in good standing of the Local Union specified in Article 1.03 for work covered by this Agreement.

2.02 As a condition of continuing employment, all Employees shall maintain in good standing their membership in the Local Union.

2.03 The employer acknowledges and agrees that the work covered by this Agreement is within the exclusive jurisdiction of the Union and its affiliated bargaining agents, notwithstanding the claims of any other Trade Union.

2.04 The Employer agrees that notwithstanding the claims of any other Trade Union, it shall assign exclusively to members of the Union and its affiliated bargaining agents all of the work covered by this Agreement.

2.05 The Employer agrees to engage only sub-contractors who are in the contractual relations with the Union and/or its affiliated bargaining agents for all work covered by this Agreement, or work forming part of an I.C.I. General Contract, except the work described in Schedule "D" hereof.

Schedules "A", "B", "C" and "D" referred to in these two articles are schedules to the master portion of the Agreement. The first three of these schedules serve to define more specifically the parties to the Agreement, while schedule "D" serves to exclude certain work from the subcontracting limitations of clause 2.05 including, *inter alia* "all waterproofing and cement finishing work". There are also a series of Local Union Schedules, one for each affiliated local union of the employee bargaining agency. These schedules set out the wages and other working conditions which apply to the geographical jurisdiction of each local.

11. The Agreement also contains three trade appendices, one each for masonry tenders, cement finishers and waterproofing. These appendices contain their own recognition and union security clauses and other clauses dealing with working conditions and the regulation of work, some of which are set out below.

TRADE APPENDIX FOR MASONRY TENDERS

Article 1 — Recognition and subcontracting

1.01 The members of the Ontario Masonry Contractors' Association as outlined in Schedule "A" of this Appendix, and such other Employers who become bound by this Appendix hereinafter referred to jointly and severally as the "Employer" recognize the Union as the exclusive Bargaining Agency for mason tenders in the employ of the Employer while performing work outlined in Article 2 and classified under Schedule "B" of this Appendix in the Province of Ontario in the area outlined in Schedule "B" of the Master Portion of the Agreement and agree to be bound by the terms and conditions as set out in this Appendix. This Appendix shall also apply to all other Employers who are primarily engaged as masonry contractors for whose Employees the Union is the Bargaining Agency.

...

1.03 Where a conflict arises between this Appendix and the general clauses in the Master Agreement, or Local Schedules, this Appendix shall prevail in all instances with respect to any Employees/ Employers covered under Article 1.01 above.

1.04 An individual Employer desirous of sub-contracting any work encompassing the skills of a mason tender as described in Article 2, shall

only sub-contract such work to a sub-contractor for whom the Union holds bargaining rights.

Article 2 — Work Jurisdiction

2.01 The Employer recognizes the Union work jurisdiction shall include that work which has been historically or traditionally or contractually assigned to members of the LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA in the tending of Masons including unloading, mixing, handling and conveying of all materials used by Masons including Refractory by any mode or method; the unloading, erecting, dismantling, moving, and adjustment of scaffolds; the starting, stopping, fueling, oiling, cleaning, operating, and maintenance of all mixes, compressors, mortar pumps, fork lifts, tuggers, and other devices under the direction of the Employer or his representative.

Schedule "A" lists the respondent amongst the members of the Ontario Masonry Contractors' Association.

CEMENT FINISHERS APPENDIX

Article 1 — Recognition

1.01 The Employer recognizes the Labourers' International Union of North America, Ontario Provincial District Council as the sole and exclusive Bargaining Agency for all Employees for whom the Union has bargaining rights engaged in concrete finishing work as defined in Article 14 — Jurisdiction of this Appendix for the Province of Ontario.

Article 14 of the Cement Finishers Appendix does not make any specific reference to either restoration work or masonry restoration work.

Article 23 — Interpretation of this Agreement

23.01 In the event there is a conflict between the common clauses of the Master Agreement, and this Appendix for cement finishing, then this Appendix will prevail in all cases.

This Appendix contains no schedule of employers who are covered by it and there is no evidence before the Board that the respondent is an employer to which this Appendix applies.

WATERPROOFING APPENDIX

Article 1 — Recognition

1.01 The employer recognizes the Labourers' International Union of North America and the Labourers' International Union of North America, Ontario Provincial District Council as the sole and exclusive

Bargaining Agent for all Employees for whom the Unio has bargaining rights engaged in all waterproofing and restoration as defined in Article 10 [sic] of this Appendix, for the Province of Ontario.

Article 2 — Union Security

2.01 The Employer agrees to employ only members who are in good standing with Local Unions affiliated to the Labourers' International Union of North America, Ontario Provincial District Council, for work coming within the scope of this Appendix.

Article 9 — Craft Jurisdiction

(The description of craft jurisdiction in this article contains the following references to the restoration work)

13. Installation of reinforcing steel and wire mesh on concrete and masonry restoration work.

17. Concrete restoration for the purpose of weatherproofing.

19. Sandblasting, acid and alkali cleaning of walls as part of restoration and weatherproofing or waterproofing work.

20. Application or installation of any material for the purpose of waterproofing, weatherproofing, dampproofing, acidproofing or restoration.

23. Insulation in conjunction with waterproofing, weatherproofing, dampproofing or restoration work.

Article 20 — Interpretation of this Agreement

20.01 In the event there is a conflict between the common clauses of the Master Agreement, and this "Appendix for Waterproofing", than this Appendix will prevail in all cases.

12. The Labourers' Employee Bargaining Agency has been designated "... to represent in bargaining all construction labourers, in bargaining all construction labourers, including masons' or bricklayers' tenders, plasterers and plasterers' apprentices and all employees engaged in cement finishing, waterproofing or restoration work, represented by [the affiliated bargaining agents of the employee bargaining agency], in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and without limiting the generality of the foregoing, to represent in bargaining as aforesaid all employees bound by or parties to [certificates of the Ontario Labour Relations Board granted to any of the affiliated bargaining agents; voluntary recognition agreements with any of the affiliated bargaining agents; collective agreements to which any of the affiliated bargaining agents have been or are a party to or bound by, covering the industrial, commercial and institutional sector of the construction industry in the Province of Ontario.]".

13. The designation order referred to in paragraph 3 hereof designates the Operative Plasterers and Cement Masons International Association of the United States and Canada together with the applicant as a designated employee bargaining agency "... to represent in bargaining all masonry restoration employees represented by [its affiliated bargaining agents of which Local 172 is one], in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and without limiting the generality of the foregoing, to represent in bargaining as aforesaid all employees bound by or parties to [certificates of the Ontario Labour Relations Board granted to any of the affiliated bargaining agents; voluntary recognition agreements with any of the affiliated bargaining agents; collective agreements to which any of the affiliated bargaining agents have been or are a party to or bound by, covering the industrial, commercial and institutional sector of the construction industry in the Province of Ontario.]". The employee bargaining agency was a party to a provincial agreement which expired April 30th, 1980, but, at the time of hearing into this application, had not concluded a renewal agreement. Ten masonry restoration contractors had bound to that agreement.

14. When the respondent started in the construction industry in 1969, it did so as a masonry contractor on new masonry construction. Occasionally it did restoration work, but only when it was incidental to a contract for new construction and in which case it was usually sub-contracted to a contractor specializing in that kind of work. It began to seek and perform masonry restoration work in 1979. By the time this application was made, the respondent had established a separately managed division to perform the masonry restoration work. As of the application date, the respondent, through its masonry restoration division, was engaged in two projects in Toronto, one a church and the other a four-storey building. Work on the four-storey building involves sandblasting to clean the masonry, removing old mortar from the mortar joints and replacing it and tuck pointing. The employees working on this project were members neither of Bricklayers' Local 2 nor the intervener. The evidence of the applicant and respondent is in conflict as to whether this latter project was a commercial or a residential one, but it is unnecessary for the Board to determine that issue.

15. Prior to these two projects, the respondent had performed some dozen masonry restoration jobs which it considered to be small ones, although they included buildings such as the Walter Stewart Building at the Ontario College of Art, the Adelaide Court Theatre on Adelaide Street East in Toronto, the Sidney Smith and McLellan buildings at the University of Toronto and an Ontario Housing Corporation project on Teasedale Avenue in Scarborough. The respondent estimated the aggregate value of ten of these jobs to be \$50,000.00. The bulk of the work on all dozen jobs was performed by bricklayers who were members of Local 2 and labourers who were members of the intervener. The bricklayers removed the old mortar from the joints and replaced it and did tuck pointing. The labourers worked as mason tenders to the bricklayers and erected and dismantled scaffolding. In fact, the only work performed by members of the intervener for the respondent from 1969 to the date of this application was as mason tenders and erecting and dismantling scaffolding. The work which the bricklayers and labourers did *not* do included sandblasting, chemical cleaning of the exterior masonry walls and caulking, which was done by either or both of the two employees who now manage the respondent's restoration division. Notwithstanding the respondent's assertion in its reply and its argument at the hearing that the Agreement applied to its employees affected by this application, at the time when the respondent was sub-contracting the incidental restoration work as well as when it employed persons who were not members of the intervener on the 12 restoration jobs referred to above, the respondent

did not consider the Agreement to have been applicable to that work. The respondent's project signs on the 12 jobs used variably the names Clifford Masonry and Restoration Limited or Clifford Restoration. The intervener had not been aware of the respondent doing restoration work and was not aware of the four-storey building at the time that it filed the application in Board file #0580-81-R. That application names as respondent Clifford Masonry and Building Restoration Ltd. The intervener had filed a previous application for certification, which it withdrew with the Board's consent. The Board's record shows that the respondent named by the intervener in it was also Clifford Masonry and Restoration Ltd. Both of these applications arose from the intervener becoming aware of the respondent's possible presence on the church project. The intervener found that some of its members were engaged on the job and being paid pursuant to the terms of its provincial agreement. It also determined that there were other persons working on the project who were not its members or members of Local 2. According to Peter Hitchen, a business representative of the intervener, the intervener was unable to determine if the employer doing the restoration work on the church was the same one for whose employees the intervener held bargaining rights because the names differed. Therefore the intervener filed the first application to protect its interests. The second was filed five days after the first one was withdrawn. Neither application raised the issue of the two employers being under common direction or control nor sought to have them treated as one employer for purposes of the Act and thus for purposes of the Agreement which has been raised as a bar to this application. On the church job, the respondent has employed between two and six bricklayers or their apprentices, two labourers and twelve to fourteen employees who were newly hired for the project. The new employees were hired when they responded to the respondent's newspaper advertisement. The bricklayers were employed pursuant to the terms of the bricklayers' provincial agreement and were used initially to remove the old mortar from the mortar joints using pneumatic tools and replacing it with new mortar and to do tuck pointing. They also did some spray-coating of the masonry with a preservative. The twelve to fourteen newly hired employees also worked on the removal of mortar from the joints using pneumatic tools and, as they gained experience, they were used to do tuck pointing as well. The two labourers were regular employees of the respondent and were engaged with the erecting and dismantling of scaffolding on the job.

16. The applicant is seeking to represent those employees who were working on these two projects and whom it believed were not represented by either the bricklayers Local 2 or the intervener.

17. Considerable of the evidence adduced by both the applicant and the intervener dealt with their representative work jurisdiction claims. The issue for the Board to resolve, however, is not whether either one of them has jurisdiction over masonry restoration work, rather it is whether the Agreement is a bar to this application, as claimed by the respondent and the intervener. In order for it to be a bar, the Board must be satisfied that the intervener holds bargaining rights in respect of the employees of the respondent who perform masonry restoration work and that these rights are preserved in the Agreement. The respondent and the intervener claim that the intervener's bargaining rights for employees of the respondent have included masonry restoration work since 1969 when the respondent voluntarily recognized the intervener as bargaining agent for labourers employed by the respondent in the industrial, commercial and institutional sector of the construction industry. They claim further that these rights existed when the Board's accreditation order issued February 18, 1975 and were preserved by the designation of the Labourers Employee Bargaining Agency referred to in paragraph 12 above. Is their claim supported by the facts?

18. The facts are sparse as to the specific scope of the intervener's bargaining rights with respect to labourers employed by the respondent prior to April 1, 1978 when province-wide collective bargaining in the industrial, commercial and institutional sector of the construction industry came into force. The description of the bargaining rights contained in the collective agreement in effect when the respondent became bound by the Board's accreditation order is broad enough to include masonry restoration work, but there is no evidence to establish that such work fell specifically within that scope. Restoration work was occasionally an incidental part of jobs performed by the respondent, but in all cases it was sub-contracted to another contractor. There is no evidence whether the sub-contracting conformed to the collective agreement, or if it did not, whether the intervener attempted to enforce the sub-contracting clause. On such limited evidence the Board makes no finding on whether the intervener held bargaining rights under that agreement for labourers performing restoration work. Clause 1.01 of the Agreement, however, does contain specific reference to restoration work and purports to recognize the intervener as sole and exclusive bargaining agent for, *inter alia*, "...all employees engaged in ... restoration work ...". The Board is satisfied on the evidence that the Agreement, contained the same or a closely similar reference.

19. It was during the term of the first provincial agreement that the respondent began to pursue actively masonry restoration projects. Prior to the church job on which the intervener states that it became aware for the first time of the respondent's activities in restoration work, the respondent performed some 12 jobs displaying on them either the name Clifford Restoration or Clifford Masonry and Restoration Limited. On all of these jobs the respondent employed members of the intervener for part of the work. Four or five of the jobs were in prominent locations where, had not the respondent employed members of the intervener, with reasonable diligence the intervener could have been aware of the respondent's presence. Since the respondent did employ the intervener's members of these jobs, the intervener should have been aware of the nature of the work being performed. Therefore the intervener should have known that part of the work which it is now claiming falls within the scope of its bargaining rights under the Agreement was being performed by persons who were not its members. Furthermore, when the intervener became aware that the respondent might be the contractor on the church job, its president sought a meeting with the president of the respondent but failed to show up for an agreed meeting at the job site. It was shortly after this event when the intervener made its first application for certification. This is not the conduct of an exclusive bargaining agent actively asserting those bargaining rights which it claims are contained in the Agreement. It is conduct which is more compatible with that of a union which is unaware that it has the bargaining rights in question.

20. Other facts about the intervener's conduct raise the same question of whether it was aware of the rights which it is now claiming or are indicative that the intervener was at least uncertain about whether it held those rights. The collective agreement bar was raised by the intervener only after it had filed its intervention to this application. The intervention itself does not contain any claim that the intervener already holds the bargaining rights sought by the applicant. To the contrary, one of the grounds on which the intervener sought a hearing into the application was the fact that it too had made an application for certification for the same employees and wanted its application to be consolidated with the applicant's application. The filing of the two applications for certification and the intervention filed herein are the only efforts made by the intervener prior to the hearing into this application to protect its claimed bargaining rights. While it is reasonable to view the two certification applications as steps to protect its claimed bargaining rights in restoration work, as counsel for the intervener argued

they were, in a situation where the intervener was uncertain whether the respondent in each of those applications was the respondent herein and an employer with which the intervener had an established bargaining relationship, it is difficult to understand why a seasoned trade union like the intervener would not have referred in those applications to the fact that it held bargaining rights with a company of similar name and was seeking, in the alternative, a declaration under section 1(4) of the Act that the two companies be treated as constituting one employer for purposes of the Act. In light of the intervener's claim that it holds bargaining rights in restoration work by virtue of the Agreement, that would have been a logical stance for it to take. The fact that it did not do so detracts from its claim.

21. The respondent did not consider that the Agreement applied to the restoration work which it had been doing for the two years prior to this application even though its reply to the application raised the Agreement as a possible bar to the application. While an employer's opinions of whether a collective agreement applies to a particular work situation is not determinative of the fact, the respondent's conduct in the circumstances of this case are a significant factor in interpreting the intervener's conduct as it relates to the claim that the Agreement gives the intervener bargaining rights for the respondent's employees engaged in masonry restoration work. The respondent claims to have been bound to collective agreements with the intervener continuously since they first entered into a voluntary agreement in 1969. The respondent employed members of the intervener to do the work of mason tenders on all of the twelve restoration jobs which it had done in the two years prior to this application, therefore it was not attempting to hide the fact that it was doing restoration work. Nor did it attempt to hide or disguise its hiring of new employees for the church job, which hiring appears clearly to be contrary to clause 2.01 of the "master portion" of the Agreement. When the intervener's president asked for a meeting on the church project, the respondent's president agreed to meet him on the job. This is not the conduct typical of an employer which is trying to avoid its obligations under a bargaining relationship. It is, however, conduct consistent with the respondent's belief that the Agreement did not apply to the restoration work at issue and with a conclusion that the respondent was under no pressure from the intervener to recognize the bargaining rights which the intervener now claims. In short, the respondent's conduct complements that of the intervener and lends credence to the view that neither understood the intervener to hold bargaining rights for the respondent's restoration employees, or if the intervener did hold those rights, for reasons not evident to the Board, it was not asserting them.

22. As a result of all of the foregoing, even were the Board to assume without finding that the intervener held bargaining rights for employees of the respondent performing masonry restoration work when the respondent began in 1979 to actively seek such work, the facts reveal that the intervener has at all times acted as though it did not have those rights. Consequently, on these facts the Board could conclude only that the intervener, by its own conduct, had abandoned voluntarily those bargaining rights if it had them in the first place. It is unnecessary, therefore, for the Board to determine whether in fact the intervener held, by virtue of the Agreement, the bargaining rights which it claimed for the respondent's employees performing restoration work. In the result there is no collective agreement bar to this application insofar as it relates to masonry restoration work. The Board finds, therefore, that this is a timely application for certification.

23. Since the Board has found this application to be timely, it is necessary for the Board to decide how it should exercise its discretion under section 103(3) of the Act in respect of the

intervener's request to consolidate its application in Board file #0580-81-R with this application. When the Board has not issued a final decision in an application and it receives a subsequent application in respect of any of the employees in the original application, its customary practice is to exercise its discretion pursuant to clause (a) of section 103(3) and treat them as having both been made on the same date as the original one, provided that the subsequent application was made not later than the terminal date of the original application. When the subsequent application is made later than the terminal date of the original one, it is the Board's customary practice to exercise its discretion pursuant to clause (b) of section 103(3) and postpone consideration of the subsequent application until it has issued a final decision on the original application. Having considered the representations of the parties on the intervener's request, the Board is not satisfied that there is reason for it to depart from its customary practice and it declines to do so. Therefore the Board will postpone consideration of the application in Board file #0580-81-R until it has issued a final decision with respect to the application at hand.

24. Turning now to the matters remaining to be determined in this application, pursuant to section 144(1) of the Act and having regard for the designation referred to in paragraph 3 and described in paragraph 13 herein, the Board further finds that all masonry restoration employees of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all masonry restoration employees of the respondent in all other sectors in Metropolitan Toronto, The Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen persons above the rank of non-working foremen and persons covered by subsisting collective agreements, constitute a unit of employees of the respondent appropriate for collective bargaining.

25. For the purposes of clarity, the Board declares that the bargaining unit description must be read in the context of the designation referred to in paragraph 3 herein.

26. The applicant filed eighteen combination applications for membership and receipts. The combination applications for membership are signed by the employees and the receipts are countersigned and indicate that a payment of at least \$1.00 has been made within the six month period immediately preceding the terminal date of the application. The money was collected by one person. The applicant also filed four confirmations of membership. The confirmations are signed by the members, indicate that the persons in question are members in good standing of the applicant and also indicate that monthly dues ranging from \$11.00 to \$13.00 have been paid for at least one month within the six month period immediately preceding the terminal date of the application. The configurations contain a certification by an officer of the applicant that the person signing the confirmation is in fact a member in good standing. The applicant also filed a duly completed Form 54, Declaration Concerning Membership Documents, Construction Industry.

27. The respondent filed a reply, a list containing the names of 13 employees and specimen signatures within the time fixed in accordance with the *Labour Relations Act* and the Board's Rules of Procedure. The names on nine of the combination applications coincide with the names of employees on the respondent's list.

28. The Board is satisfied on the basis of all the evidence before it that more than fifty-

five per cent of the employees of the respondent in the bargaining unit, at the time the application was made, were members of the applicant on June 8, 1981, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

29. Section 144(2) of the Act, which states in part as follows, provides for the issuance of more than one certificate if the applicant has the requisite membership support:

... , the Board shall certify the trade unions as the bargaining agent of the employees in *the bargaining unit* and in so doing shall issue a certificate confined to the industrial, commercial and institutional sector and issue another certificate in relation to all other sectors in the appropriate geographic area or areas.

(emphasis added)

Therefore, pursuant to section 144(2) of the Act, a certificate will issue to the applicant affiliated bargaining agent on its own behalf and on behalf of all other affiliated bargaining agents of the employee bargaining agency named in paragraph 3 above in respect of all masonry restoration employees of the respondent in industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen, persons above the rank of non-working foremen and persons covered by subsisting collective agreements.

30. Further, pursuant to section 144(2) of the Act, a certificate will issue to the applicant trade union in respect of all masonry restoration employees of the respondent in Metropolitan Toronto, The Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, excluding the industrial, commercial and institutional sector, save and except non-working foremen, persons above the rank of non-working foremen and persons covered by subsisting collective agreements.

01219-81-R Canadian Union of Operating Engineers & General Workers, Applicant, v. Cryovac Division W.R. Grace & Co. of Canada Limited, Respondent, v. Group of Employees, Objectors.

Bargaining Unit – Certification – Whether applicant entitled to carve out Quality Control Department from normal tag-end unit as separate unit – Board refusing to depart from policy on tag-end units

BEFORE: D. E. Franks, Vice-Chairman, and Board Members J. Wilson and H. Kobryn.

***APPEARANCES:** Michael D. O'Malley and Robert Sleva for the applicant; Martin Addario, D. G. Napier and W. A. Moir for the respondent; Monika Pless and Paul Harwood for the group of employees.*

DECISION OF THE BOARD; November 12, 1981

1. By decision dated September 28, 1981, the Board appointed a Labour Relations Officer to "inquire into and report to the Board on the list of employees within the meaning of the *Labour Relations Act* not covered by a subsisting collective agreement". The Labour Relations Officer has met with the parties and the parties are in agreement with respect to the number of employees not covered by a collective agreement. The parties, however, are not agreed on the description of the appropriate bargaining unit in the present case. The applicant trade union requests a bargaining unit consisting of "all employees in the Quality Control Department of Cryovac Division W. R. Grace & Co. of Canada Limited in Mississauga, save and except supervisors and those above the rank of supervisor, and those employees covered by subsisting collective agreements". The position of the respondent is that the appropriate bargaining unit in the present case should be the normal tag end unit which the Board would find appropriate in the present circumstances.

3. The applicant trade union is party to a collective agreement with the respondent which contains the following recognition clause:

"all employees of the company, save and except stationary engineers, foremen, persons above the rank of foreman, engineers, research and development, and quality control personnel, office staff and sales staff"

The predecessor trade union (the Printing Specialties and Paper Products Union, Local 466) had a collective agreement with the following recognition clause:

"all employees of the company, save and except stationary engineers, foremen, persons above the rank of foreman, engineers, office staff and sales staff"

4. The question we are faced with in the present case is whether or not the applicant trade union should be entitled to carve out from the normal tag unit the Quality Control Department as a separate unit. Based on the agreement of the parties, there are 21 such employees who would be involved in the Board's normal tag end unit, whereas the list of employees in the Quality Control Department only sets out 9 employees. In the case of an industrial establishment the bargaining unit which the Board normally finds to be appropriate

is a unit of all plant or production employees. In the event that there are employees outside that unit, on a subsequent application for certification, the Board will normally require the trade union to bargain on behalf of all of the remaining plant employees in order to prevent the undue fragmentation of bargaining. This of course is referred to as a "tag end unit" and it would follow that there is only one tag end unit to a production unit. It would thus appear that subsequently the recognition provisions changed to remove from the bargaining unit, research and development and quality control personnel.

5. In view of the background of this case, particularly the increased exclusions to the bargaining unit, we are of the view that it is not appropriate in the present case to depart from our policy with respect to tag end units. Therefore, the applicant trade union is not entitled to a bargaining unit consisting solely of the quality control unit employees.

6. The Board is satisfied on the basis of all the evidence before it that less than forty-five per cent of the employees of the respondent in any bargaining unit that the Board might find to be appropriate, at the time the application was made were members of the applicant on September 11, 1981, the terminal date fixed for this application and the date which the Board determines under section 103(2)(j) of the *Labour Relations Act* to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

7. Accordingly, this application is dismissed.

0774-81-R Sheet Metal Workers' International Association Local Union #285, Applicant, v. Diversified Sheet Metal Limited, Respondent, v. Group of Employees, Objector

Certification – Construction Industry – Applicant not included in the minister's designation – But meeting definition of "affiliated bargaining agency" – Whether entitled to apply under subsection 1 or 5 of section 144

BEFORE: D. E. Franks, Vice-Chairman, and Board Members M. Eayrs and D. B. Archer.

APPEARANCES: *S.B.D. Wahl and J. Kurchak for the applicant; J. P. Wearing and R. Hazell for the respondent; Stephen McGowan and Martin Schoblocher for the group of employees.*

DECISION OF THE BOARD; November 18, 1981

1. By decision dated August 21, 1981, the Board listed this matter for continuation of hearing. By that decision the Board directed that the designated employer bargaining agency and the designated employee bargaining agency for sheet metal workers be given notice of the continuation of hearing, and set out certain problems which the Board saw with respect to section 143 of the Act. Notice of hearing was given to these agencies, however, it appears that they chose not to avail themselves of the opportunity to make representations concerning the matters at issue in the present case.

2. As the Board's decision of August 21st pointed out, the employees affected by this application are employed on two separate projects, one of which would appear to fall in the residential sector of the construction industry, and one which clearly falls within the industrial, commercial and institutional sector of the construction industry. That decision also pointed out that the applicant in the present case, Sheet Metal Workers' International Association Local Union #285 is not a party to the employee bargaining agency designated by the Minister under the Act, nor is it signatory to the provincial agreement affecting sheet metal workers.

3. It appears that the relevant facts in the present matter are not in dispute. The applicant local was chartered on October 10, 1957, and such charter does not contain any limitation on the activity of that local. That is, since that date it has apparently represented sheet metal workers in all sectors of the construction industry in the ordinary course of its operations. Indeed, at the hearing it was suggested that some 40 per cent of its membership work involved work in the industrial, commercial and institutional sector during any particular year, and that some 30 per cent consistently worked on industrial, commercial and institutional projects.

4. The designation for the employee bargaining agency relating to sheet metal workers reads as follows:

"Pursuant to clause *a* of subsection 1 of section 127 of the *Labour Relations Act*, R.S.O. 1970, c. 232, as amended, I hereby designate the Sheet Metal Workers' International Association and The Ontario Sheet Metal Workers' Conference consisting of Locals 30, 47, 235, 392, 397, 473, 504, 537, 539, 562 and 629 of the Sheet Metal Workers' International Association as the employee bargaining agency to represent in bargaining all Journeymen and Apprentice sheet metal workers, sheeters, sheeters' assistants and material handlers represented by the following affiliated bargaining agents:

1. The Sheet Metal Workers' International Association and The Ontario Sheet Metal Workers' Conference; or
2. The following Local Unions: 30, 47, 235, 392, 397, 473, 504, 537, 539, 562 and 629; or
3. any other Local of the Sheet Metal Workers' International Association which in the future may be chartered to represent Journeymen and Apprentice sheet metal workers, sheeters, sheeters' assistants and material handlers, (which Conference and Unions are hereinafter collectively referred to as "the Unions"), in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and without limiting the generality of the foregoing, to represent in bargaining as aforesaid all employees bound by or parties to:
 - (a) certificates of the Ontario Labour Relations Board granted to the Unions or any of them;

- (b) voluntary recognition agreements with the Unions or any of them;
- (c) collective agreements to which the Unions or any of them have been or are party to or bound by, covering the industrial, commercial and institutional sector of the construction industry in the Province of Ontario."

It is of course obvious from the above designation that Local 285 is not one of the locals listed as part of the Ontario Sheet Metal Workers' Conference nor is it a local outlined in paragraph 2 as one of the listed affiliated bargaining agents on whose behalf the designated agency is entitled to bargain.

5. The above designation was made by the Minister of Labour pursuant to section 139(1)(a) (then 127(1)(a)) whereby the Minister designated "employee bargaining agencies to represent in bargaining provincial units of affiliated bargaining agents, and describe[d] those provincial units". The provisions of the Act relating to province-wide bargaining only apply to bargaining activity in the industrial, commercial and institutional sector of the construction industry. This is clear from the definition of "bargaining" and "provincial agreement" which refer to section 117(e). These definitions are as follows:

"137.-(1) In this section and in sections 138 to 151,

...

- (b) "bargaining", except when used in reference to an affiliated bargaining agent, means province-wide, multi-employer bargaining in the industrial, commercial and institutional sector of the construction industry referred to in clause 117(e);

...

- (e) "provincial agreement" means an agreement in writing covering the whole of the Province of Ontario between a designated or accredited employer bargaining agency that represents employers, on the one hand, and a designated or certified employee bargaining agency that represents affiliated bargaining agents, on the other hand, containing provisions respecting terms or conditions of employment or the rights, privileges or duties of the employer bargaining agency, the employers represented by the employer bargaining agency and for whose employees the affiliated bargaining agents hold bargaining rights, the affiliated bargaining agents represented by the employee bargaining agency, or the employees represented by the affiliated bargaining agents and employed in the industrial, commercial and institutional sector of the construction industry referred to in clause 117(e)."

6. The consolidation of bargaining which is provided for in the Act deals with bargaining by "affiliated bargaining agents". These are defined in section 137(1)(a):

“affiliated bargaining agent” means a bargaining agent that, according to established trade union practice in the construction industry, represents employees who commonly bargain separately and apart from other employees and is subordinate or directly related to, or is, a provincial, national or international trade union, and includes an employee bargaining agency.”

On the facts of the present case, Local 285 is, according to established trade union practice in the construction industry a union that represents employees which commonly bargains separately and apart from these employees (i.e. it is a construction craft union) and it is subordinate to the Sheet Metal Workers' International Association since it was chartered by that International Trade Union. It is thus clear that the applicant, Local 285 falls within the definition of “affiliated bargaining agent” as defined by section 137(1)(a).

7. Although the local is not included in the designation, that fact does not exempt the local from the strictures of section 146(2) and section 145(1) which read as follows:

“146.-(2) On and after the 30th day of April, 1978 and subject to sections 139 and 145, no person, employee, trade union, council of trade unions, affiliated bargaining agent, employee bargaining agency, employer, employers' organization, group of employers' organizations or employer bargaining agency shall bargain for, attempt to bargain for, or conclude any collective agreement or other arrangement *affecting employees represented by affiliated bargaining agents* other than a provincial agreement as contemplated by subsection (1), and any collective agreement or other arrangement that does not comply with subsection (1) is null and void.”

(emphasis added)

“145.-(1) Subject to subsection (2), any collective agreement in operation on the 27th day of October, 1977 *in respect of employees employed in the industrial, commercial and institutional sector* of the construction industry referred to in clause 117(e) and *represented by affiliated bargaining agents* is enforceable by and binding on the parties thereto only for the remainder of the term of operation of the agreement, regardless of any provision respecting its renewal.”

(emphasis added)

These sections clearly apply to employees represented by affiliated bargaining agents and employed in the industrial, commercial and institutional sector of the construction industry.

8. The problem which arises in the present case is the application of section 144 to the present application for certification. Section 144(1), (3) and (5) which deal with applications for certification read as follows:

“144.-(1) An application for certification as bargaining agent which relates to the industrial, commercial and institutional sector of the construction industry referred to in clause 117(e) shall be brought by either,

- (a) an employee bargaining agency; or
- (b) one or more affiliated bargaining agents of the employee bargaining agency,

on behalf of all affiliated bargaining agents of the employee bargaining agency and the unit of employees shall include all employees who would be bound by a provincial agreement together with all other employees in at least one appropriate geographic area unless bargaining rights for such geographic area have already been acquired under subsection (3) or by voluntary recognition.

...
 (3) Notwithstanding subsection 119(1), a trade union represented by an employee bargaining agency may bring an application for certification in relation to a unit of employees employed in all sectors of a geographic area other than the industrial, commercial and institutional sector and the unit shall be deemed to be a unit of employees appropriate for collective bargaining.

...
 (5) Notwithstanding subsections (1) and (4), a trade union that is not represented by a designated or certified employee bargaining agency may bring an application for certification or enter into a voluntary recognition agreement on its own behalf."

It is to be noted that subsection (1) deals with "affiliated bargaining agents of the employee bargaining agency" whereas subsection (3) deals with "a trade union represented by an employee bargaining agency" and subsection (5) deals with "a trade union that is not represented by a designated or certified employee bargaining agency".

9. Counsel for the applicant argues that the applicant, since it is not included in the designation, should be entitled to make an application for certification under subsection (5) since it is clearly a "trade union that is not represented by a designated or certified employee bargaining agency".

10. However, as noted above, the applicant trade union is clearly an affiliated bargaining agent notwithstanding the fact that it has not been included in the designation made by the Minister. To certify the applicant under subsection (5) would have the curious result that the applicant would not be able to enter into a lawful collective agreement with respect to certain of the employees in the bargaining unit, (namely, those in the industrial, commercial and institutional sector).

11. In view of the foregoing, the Board is reluctant to allow the applicant to make an application under subsection (5) of section 144 as requested by counsel for the applicant. We note, however, that whereas subsection (3) and subsection (5) of section 144 referred to trade unions represented by an employee bargaining agency and trade unions that are not represented by designated or certified employee bargaining agencies, subsection (1) talks

simply of affiliated bargaining agents of the employee bargaining agency. It would therefore appear that the applicant is entitled to bring an application under subsection (1) of section 144. In such an application the appropriate unit of employees must include "all employees who would be bound by a provincial agreement together with all other employees in at least one geographic area, unless bargaining rights for such geographic area have already been acquired". However, as noted above, since the applicant trade union is not party to the provincial agreement, when the Board certifies the applicant as bargaining agent of the employees and issues two certificates as instructed by subsection (2) of section 144, it would appear that the provincial bargaining agency is certified for the industrial, commercial and institutional sector on a province-wide basis, whereas the applicant local would be issued a certificate in relation to all other sectors in the appropriate geographic area, and we propose to do this in the present case.

12. The Board further finds, pursuant to section 144(1) of the Act, that all journeymen sheet metal workers and registered apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all journeymen sheet metal workers and registered sheet metal apprentices in the employ of the respondent in all other sectors in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman, constitute a unit of employees of the respondent appropriate for collective bargaining.

13. The Registrar is directed to list this matter for continuation of hearing in order to deal with the petition filed by the group of employees objecting to this application.

1502-81-R Employees' Association of Groves Park Lodge, Applicant, v. 428378 Ontario Limited c.o.b. as **Groves Park Lodge**, Respondent, v. Canadian Union of Public Employees, Intervener.

Interference in Trade Unions – Pre-Hearing Vote – Trade Union Status – Employee association seeking prehearing vote to displace incumbent union – Whether required to prove status prior to vote – Board following *Emery Industries* case

BEFORE: R. D. Howe, Vice-Chairman, and Board Members J. D. Bell and O. Hodges.

DECISION OF R. D. HOWE, VICE-CHAIRMAN, AND BOARD MEMBER J. D. BELL;
November 6, 1981

1. This is an application for certification.

• • •

3. The applicant has requested that a pre-hearing representation vote be taken.

4. The applicant has not previously established in any proceedings before the Board that it is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act*. The intervener, as the incumbent bargaining agent for the employees in question, requests that the applicant be required to prove that it has status as a trade union before a representation vote is directed in this matter. In support of that request, the intervener submits that the taking of a representation vote before the applicant has established that it is a trade union within the meaning of section 1(1)(p) of the Act would give the voters the impression that the Board has already granted status to the applicant and that it is, therefore, a bona fide trade union.

5. In *Emery Industries Limited*, [1980] OLRB Rep. Mar. 316, at paragraph 5, the Board described the purpose of the pre-hearing vote procedure as follows:

“The purpose of the pre-hearing, or ‘quick vote’ procedure is to facilitate a prompt resolution of representation questions, by permitting the Board to test employee wishes as soon as possible following the application date. This avoids the potential prejudice which might arise if a representation vote had to await a decision following a formal certification hearing. Some delay is inevitable, but the pre-hearing vote procedure is a legislative attempt to remove some of the problems, and prejudice, associated with delay while, at the same time, ensuring that all of the parties will be given a full opportunity to make their submissions with respect to any matters in dispute.”

In the *Emery* case, the intervener trade union argued that an applicant is not entitled to utilize the pre-hearing vote procedure until it has established its status as a trade union. In rejecting that contention, the Board stated (at paragraph 11):

“There is no reason for according the ‘status issue’ a special significance which removes it from the ambit of a legislative scheme which specifically provides for a resolution of disputed issues *after* a vote is taken. Of

course, if one adopts a strict 'sentence-parsing' approach, one encounters the word 'trade union' before mention is made of such matters as employee status, the appropriate bargaining unit, and membership in the trade union; but, while it may appear that one determination is a condition precedent separate from the next, in our view it is clear, having regard to the purpose and structure of section 8, that the Legislature intended that all of these matters be resolved at the hearing *following* the vote. The Board cannot certify the applicant union until its trade union status is determined; but we can see no reason for singling out the trade union status issue for special treatment; nor can we discern any labour relations objective which would be served by denying new unions access to the pre-hearing vote procedure. There is no reason why these new unions should be put at a competitive disadvantage *vis-a-vis* established organizations, and it would require the clearest possible language before the Board would be driven to this conclusion. There may well be cases where the issues raised are of such nature, or complexity, that a pre-hearing vote is inappropriate. Section 8 is framed so that the Board has a discretion to order a pre-hearing representation vote, and Rule 5 of the Rules of Practice regulates the procedure which must be followed when the Board has refused this request. However, there is nothing in the issue of trade union status, *per se*, which prevents the taking of a vote, nor is there any evidence, in this case, of any other special circumstances which make such vote inappropriate or which justify any interference with the previous Board decision. In our view the Board was entitled to direct the taking of a vote and defer resolution of the trade union status issue."

(See also, *Ontario Hospital Association (Blue Cross)*, [1981] OLRB Rep. April 468, at paragraph 30, in which the Board specifically endorsed the approach adopted in the *Emery* case; cf. *Tri Canada Inc.* [1981] OLRB Rep. June 794.)

6. By letter dated October 30, 1981, Helen O'Regan on behalf of the intervener provided the Board with a "scenario of events as they pertain to the history of bargaining between the intervener and the respondent" and requested the Board to take all of those matters into consideration before taking any action relating to this application. Without expressing any view concerning the effect which those events, if proved, might have on the ultimate disposition of this application, the Board is satisfied that the letter does not set forth circumstances which would make the taking of a pre-hearing representation vote inappropriate.

7. It appears to the Board on an examination of the records of the applicant and the records of the respondent that not less than thirty-five per cent of the employees of the respondent in the voting constituency hereinafter described were members of the applicant at the time the application was made.

8. Having regard to the agreement of the parties, the Board directs that a pre-hearing representation vote be taken of the employees of the respondent in the following voting constituency:

All employees of the respondent at Renfrew, Ontario, save and except

professional and medical staff, registered and graduate nurses, undergraduate nurses, supervisors, persons above the rank of supervisor, office staff, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period.

9. All employees of the respondent in the voting constituency on the 22nd day of October, 1981, who have not voluntarily terminated their employment or who have not been discharged for cause between the 22nd day of October, 1981 and the date the vote is taken will be eligible to vote.

10. Voters will be asked to indicate whether they wish to be represented by the applicant or by the intervener in their employment relations with the respondent.

11. The Board directs that the ballot box containing all the ballots cast in the pre-hearing representation vote be sealed and that the ballots not be counted pending further direction by the Board.

12. Having regard to the objections raised by the intervener, the Registrar is directed to list this matter for hearing at the earliest possible date following the holding of the vote for the purpose of according the applicant an opportunity to establish that it is a trade union within the meaning of section 1(1)(p) of the Act, and to hear the evidence and submissions of the parties on that issue and all other matters arising out of and incidental to this application.

13. The matter is referred to the Registrar.

DECISION OF BOARD MEMBER O. HODGES;

1. I dissent from the conclusion of the majority. I wish to express in the strongest possible terms my disagreement with the decision of the majority that an organization which has not yet established its status as a trade union may participate in a pre-hearing representation vote in an attempt to displace an incumbent union.

2. As apparent from the majority decision, this is not the first time that this issue has come before the Board. The principle endorsed by the majority has its origin in *Emery Industries Limited*, [1980] OLRB Rep. Mar. 316. This decision was followed in a more recent decision *Ontario Hospital Association (Blue Cross)*, [1981] OLRB Rep. April 468, with Board Member D. B. Archer dissenting.

3. I consider this matter to be serious enough that I propose to set out my reasons for dissent in some detail, even at the risk of being repetitious of what Board Member Archer has already stated in his dissent in the *Ontario Hospital Association case*.

4. The *Labour Relations Act*, section 9(1) states that "upon an application for certification, the *trade union*, may request that a pre-hearing representation vote be taken." Does not this provision make it clear that only an organization which has established status as a "trade union" may request for a pre-hearing vote?

5. In *Emery Industries*, at paragraph 11, the Board seemed to characterize this argument as mere "sentence parsing". With respect, I disagree. The use of the term "trade

union" in section 9 (1) is not a coincidence nor is it a mere technicality. It has real practical consequences which may significantly influence the whole process of pre-hearing representation votes. There is furthermore a fundamental distinction in origin between the applicant trade union in the *Emery Industries* case and the applicant associations in this application and *Ontario Hospital Association*. That distinction must be made clear because it is the perception of the status of the applicant trade union by employees, whom it aspires to represent in collective bargaining with their employer, that is absolutely crucial. Employees must not be misled in their judgement of the bona fides of an applicant. The law forbids employer meddling in the creation of a bargaining agent. Section 64 of the Act provides as follows:

"64. No employer or employers' organization and no person acting on behalf of an employer or an employer's organization shall *participate in or interfere with the formation, selection or administration of a trade union or the representation of employees by a trade union or contribute financial or other support to a trade union*, but nothing in this section shall be deemed to deprive an employer of his freedom to express his views so long as he does not use coercion, intimidation, threats, promises or undue influence." (emphasis added)

That essential condition is proven only when a new employee organization is accorded status as a result of a hearing by this Board.

6. The applicant in *Emery Industries* was a trade union created by the merger of two trade unions who had both long established their status before this Board and their presence as bona fide trade unions was evident. The status issue rested upon a technical challenge by the intervening trade union with regard to the constitutional authority of one of the merging locals to do so. On the other hand the trade union status of the applicant association in *Ontario Hospital Association*, and in this case, was not established anywhere by any means at the time the request for a pre-hearing vote was made. Indeed in *Ontario Hospital Association*, allegations of employer influence in the organization of the applicant association were made by the incumbent trade union, but no opportunity to prove those allegations was afforded until the hearing to prove status which was held *after the vote*. In my opinion, to cite the *Emery Industries* case as Board jurisprudence in the present case is inaccurate on the essential facts required to prove status, just as it was wrong in the *Ontario Hospital Association* case.

7. We have to assume that the average employee is not familiar with the provisions of the Act or the Board's policies. When the Board directs a vote in these circumstances, as far as the employees are concerned, they have a choice between two "trade unions". The mere direction of a vote by the Board inevitably is seen as a recognition by the Board of the status of both competing organizations. It is not realistic to expect the average employee to be sophisticated enough to realize that a subsequent proceedings will determine whether the organization in relation to which they voted was in fact a trade union.

8. In summary, the overt mischief of the present Board policy of conducting a pre-hearing vote at a time when the applicant had not established its trade union status is twofold:

- (1) The Board's policy misleads employees into believing that the vote is between two trade unions, both viable entities capable of repre-

sending the employees in the bargaining unit in collective bargaining, when there is no assurance that this is so with respect to the entity that has not yet been accorded trade union status.

- (2) The preamble to the *Labour Relations Act* recognizes that harmonious relations between employers and employees is in the interest of the province. That being so, the established relationship between a trade union and an employer should be disrupted only in the clearest of cases. If after the conduct of the vote, the Board finds that the association in fact did not have status, the Board would have contributed to a pointless disruption of the relationship and perhaps caused irreparable harm to the trade union's strength. Where a displacement application is filed by an association of unproven status at a time when the incumbent union and the employer are in the process of negotiating for a collective agreement, for the Board to direct a pre-hearing vote is to undermine the incumbent union's bargaining strength by interrupting the negotiations. And all this may be for no justifiable reason if later it turns out that the association was not a trade union within the meaning of the Act. To allow the bargaining relationship to suffer the fragmentation of employee commitment through a pre-hearing vote under these circumstances is in my view counter to sound labour relations policy and ought to be avoided.

9. The majority also relies on the general principle that in a pre-hearing vote, resolution of disputes is postponed until after the vote. In my view, this principle holds true only with respect to those disputes that cannot possibly affect the vote in any way. Examples of these are disputes relating to employee status or the appropriateness of the bargaining unit. However, the issue of trade union status goes to the very issue of whether the subject organization is entitled to any rights under the Act. Besides, as I pointed out above, the direction of a vote may mislead the voters into believing that the organization is in fact a trade union and this can influence the way in which they vote. As Board Member Archer points out in his dissent in *Ontario Hospital Association (Blue Cross)*, the voters are being asked to vote for an organization which may or may not be in existence. The voters have no assurance that the organization has a valid constitution or elected officials. Most importantly, the voters are not assured that the organization is not employer dominated.

10. For the foregoing reasons, I am convinced that the so called "Emery principle" is wrong, and should not be followed. In the alternative, the Board should distinguish this case from *Emery Industries* on the basis that here the applicant is a completely unknown and new entity whereas in *Emery Industries* both competing unions were well established unions and the only issue as to "status" was the technicality relating to the validity of a merger agreement.

11. The majority may be concerned that to require proof of status prior to a pre-hearing vote will deny new unions the benefit of a "quick vote". (See, paragraph 11 of the *Emery Industries* case quoted in the majority decision at paragraph 5). While this is a reasonable concern, the remedy should not be to direct votes irrespective of the status of the organization. In recent times, employee associations such as the applicant, have been formed in increasing numbers and the employee association has been used as an alternative to opposing an

incumbent trade union through a termination application or a petition. (See, *Tri-Canada Inc.*, [1981] OLRB Rep. Oct. 1509. The Board in *Tri-Canada* referred to this new trend and pointed to the advantages obtained by those opposing a trade union by resorting to the employee association approach. (See paragraph 9). Given this fact, the Board should not further assist these 'new' unions by giving the employees the impression that these are 'bona fide' trade unions when in fact they may not be so.

12. The Board should look to other remedies such as conducting a quick 'status' hearing in these circumstances. If indeed it is necessary, from a point of view of overall labour relations policy, it is less of an evil to deny *all new unions* the benefit of a quick pre-hearing vote than to adhere to the approach adopted by the majority. In my view, it is not repugnant to labour relations policy or to common reason, to place a new, unknown entity at some disadvantage, when it is competing with an established, proven and incumbent trade union, specially since this disadvantage attaches only the first time such entity seeks bargaining rights.

13. Finally, if the Board finds this case not distinguishable from its past decisions it should realize the gravity of the situation and simply be prepared to depart from the "Emery principle". After all, the precedent goes back only to 1980. The Board has not, as a general rule, considered itself to be bound by its previous decisions. (For example, see *La-Z-Boy Canada Limited*, [1981] OLRB Rep. April 460, where the Board reversed its policy requiring a presence in the province as a pre-condition for trade union status, — a policy which had existed for nearly 20 years). In fact in a recent application for judicial review (*Oakwood Park Lodge*, date of hearing, November 3, 1981) the Divisional Court, in dismissing the application, endorsed the record in part as follows:

"The Board is not bound to follow its previous decisions. The extent to which it chooses to do so in any given case is clearly a matter within its own jurisdiction."

It is clear that the Board has the discretion to depart from its past decisions. The Board should not hesitate to do so in this case.

14. I would have required the applicant to prove its status as a trade union prior to the taking of a pre-hearing vote.

0206-81-R United Steelworkers of America, Applicant, v. **H. G. Francis and Sons Limited**, Respondent, v. Group of Employees, Interveners.

Employee – “Contractors” employed by employer carrying on home heating fuel business – Whether independent contractors or dependent contractors

BEFORE; R. O. MacDowell, Vice-Chairman, and Board Members B. L. Armstrong and C. G. Bourne.

APPEARANCES: *H. G. MacKenzie for the applicant; W. T. Langley and N. Campbell for the respondent; and no one appeared for the interveners.*

DECISION OF THE BOARD; November 18, 1981

I

1. This is an application for certification in which the applicant seeks to represent a bargaining unit of dependent contractors. The principal issue before the Board is the employee status of the individuals affected by the application. The respondent contends that they are independent contractors and, as such, are beyond the scope of the Act.

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3. The respondent H. G. Francis and Sons Limited (“Francis”) is engaged in the business of selling heating oil, and servicing the oil heating equipment of its customers. To perform these functions, Francis uses its own employees, and certain individuals whom it describes as “contractors”. The two kinds of serviceman seem to be used more or less interchangeably. The applicant contends that the contractors are “dependent contractors” within the meaning of section 1(1)(h) of the *Labour Relations Act*. That section reads as follows:

“1(1) In this Act,

(h) “dependent contractor” means a person, whether or not employed under a contract of employment, and whether or not furnishing his own tools, vehicles, equipment, machinery, material, or any other thing, who performs work or services for another person for compensation or reward on such terms and conditions that he is in a position of economic dependence upon, and under an obligation to perform duties for, that person more closely resembling the relationship of an employee than that of an independent contractor.”

4. The union and Francis are parties to a collective agreement executed on April 16, 1981, and covering *employees* employed by the company as oil burner servicemen. The agreement does not apply to “contractors”. The current application was filed on April 27, 1981, but on or about April 21, 1981, all of the persons affected by this application signed new “service contracts” with Francis, which Francis claims provide the foundation for their status as “independent contractors”. It is admitted that prior to executing those agreements the majority of the contractors with whom we are concerned were clearly employees of Francis

and, as such, clearly covered by the collective agreement. In fact, two of the individuals who became "contractors" on April 21, 1981, signed the collective agreement on behalf of the *employees* on April 16, 1981, barely five days before.

5. In accordance with its usual practice, the Board appointed a labour relations officer to inquire into the employee list and the composition of the proposed bargaining unit. The respondent originally specified that there were seven contractors affected by the application; however, during the officer's inquiry, the respondent sought to add an eighth individual, — Darrell Francis, — whom it claimed was also potentially affected. For reasons more particularly set out below, the Board is satisfied that there is no prejudice to the applicant in permitting the respondent to amend its list to add Darrell Francis to the group of contractors whose status is in dispute.

6. The officer's hearing was attended by representatives of the applicant, the respondent and the interveners. Six of the seven contractors were present and gave evidence. On the basis of that evidence, the parties have submitted to the Board an agreed statement of fact upon which this decision is based. It might be noted that there was little direct evidence concerning the duties of the respondent's employees, or the relationship between the respondent and the alleged dependent contractors prior to their most recent contract.

7. For at least ten years, Francis has been using both employees and contractors to service the equipment owned by its customers. The functions performed by both groups are similar. When it has become necessary to expand its work-force, Francis has left it up to the individuals hired to decide whether they wished to be "employees" or "contractors".

8. Francis' *employees* are dispatched to the customers' locations by radio. They supply their own tools. They are paid according to a piece-work rate depending upon the number of furnace cleanings or related services performed, and they are responsible for poor workmanship, — either through a charge-back arrangement whereby they pay for the cost of repair, or in accordance with a contractual requirement to complete the job without further compensation. If an employee leaves the respondent's employ, the respondent retains a "hold-back" from his wages, to cover any defects in workmanship which may subsequently arise.

9. The contractors have the right to provide services to Francis' customers in an area designated by the company. Like Francis' employees, they supply their own tools, and are linked to Francis' communications system and dispatcher. But the right to provide service in their designated area is not exclusive. Francis reserves the right to designate other contractors or employees to provide such services as it considers necessary. On the other hand, the contractors are prohibited from servicing Francis' customers in any other area except as may be required by Francis itself.

10. The contractor undertakes to provide an annual cleaning for Francis' customers in his designated area, as well as such service calls as the customers may require. These include consultation, testing, maintenance, or emergency services. The contractors are responsible for the latter, twenty-four hours per day, seven days a week, both in their own area and such other areas as Francis may specify.

11. A contractor cannot sell his labour or materials on his own account to any of Francis' customers. The repair work which he does, requires the customer's consent, and is

subject to review, by Francis. the contractor is required to report promptly to Francis any problems which he encounters and he must affix to the customer's equipment a sticker identifying Francis as the entity to call in the event of problems. Any maintenance job exceeding \$150,00 is funnelled through Francis, which obtains the customer's permission (and presumably reviews the situation) before the contractor performs any work. The company undertakes to designate sources of supply from which the contractors may purchase parts.

12. The contractors collect some of the accounts from those customers of Francis which have approved credit ratings, but apparently the contractors bear the risk of loss if customers do not pay for their services. Francis pays the contractors twice a month. The contractors bear the cost of vehicle repair, expenses, license fees, taxes and so on.

13. The contract purports to shift vicarious liability entirely to the contractor, who undertakes to indemnify Francis for all claims arising from his activities, including any claims connected with the operation of a motor vehicle. The contractor further undertakes to maintain insurance coverage at a designated level, and to furnish Francis with certified copies of his insurance policies. The contract includes a number of clauses concerning "employees" hired by the contractors; however, there is no direct evidence that any employees or helpers have, in fact, been hired. One of the contractors (whose wife worked) hired someone to book his calls for him; but this was the extent of the evidence concerning the contractors' use of other "employees". The contractors do arrange for "back-up" personnel to cover for times when they may be unavailable; but, these "back-up" persons must "wherever possible" be other contractors, and the names of the "back-up" servicemen must be provided to Francis so that it can insure that they are competent and properly licensed.

14. Three of the contractors own their own trucks. Five contractors do not own their own trucks. Three of these lease their vehicles from Francis. One used to lease his truck from Francis but now leases a vehicle from another supplier. Darrell Francis uses a company truck. The trucks need not carry the Francis logo, but they cannot display the logo of a competing company, and must be marked in a way which is acceptable to Francis.

15. The overwhelming proportion of the contractors' income comes from Francis. Most of the contractors were unwilling or unable to do work for anyone else. One contractor indicated that he occasionally performed some work for friends or neighbours, but he was the exception. There is no contractual prohibition on working for others, and the contract provides economic incentives for "leads" which attract customers to Francis. In practice however, the contractors primarily service those customers which Francis designates.

16. The contractors set their own hours, although it is customary to contact Francis at the beginning of their working day. The contractors are required to respond to the needs of Francis' customers. To assist them, they use the two-way radio linked to the company's dispatcher. The radio is rented from Francis.

17. The contract by which the contractors are bound cannot be assigned without the company's consent, but it can be terminated on 24 hours notice at the sole discretion of Francis. If terminated, there is a three month "hold-back" to cover any expenses which Francis may incur, arising from the contractor's poor workmanship. Following termination of his contract, the contractor is prohibited from supplying any service to Francis' customers for a period of three years. There is little evidence of any negotiations with respect to these terms. It

appears that there was some discussion with respect to the fee schedule, but that the terms under which the contractors work are largely dictated by Francis.

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18. The *Labour Relations Act* was amended in 1975 to include, for the first time, the concept of the "dependent contractor" — that is individuals whose economic circumstances are roughly analogous to those of employees with whom the dependent contractors often compete in the labour market) but whose legal status, and right to engage in collective bargaining are somewhat ambiguous at common law. The concept is of European origin, but was explored in the North American context in a perceptive article by professor Arthurs. [See: *The Dependent Contractor: A Study of the Legal Problems of Countervailing Power* (1965) 16 U. of T.L.J. 89.] The following excerpts from that article amply illustrate both the legal issues associated with the dependent contractor concept, and the kind of relationship to which section 1(1)(h) is directed.

"Unequal power between private persons, no less than between citizen and state, is an unhappy fact of modern society. In one area — Employment relations — public policy has clearly adopted collective bargaining as a technique for redressing this imbalance of power. In another area — commercial competition — collective action is generally suspect as the vehicle by which a powerful group may overwhelm weak individuals. This study concerns the paradoxical plight of groups of competitors who may find survival difficult without collective action. They are often economically vulnerable as individuals because of the dominance of a monopoly buyer or seller of their goods or services, or because of disorganized market conditions. If viewed as "independent contractors" rather than "employees" they lack the legal status which is a prerequisite of the right to bargain collectively under labour relations legislation. As businessmen, they cannot legally employ collective tactics to buy or sell or otherwise stabilize conditions, because of the combines legislation. They are prisoners of the regime of competition. Because the choice of either legal designation — "employee" or "independent contractor" — in effect prejudges the issue of their right to bargain collectively, a new term is needed: "dependent contractor." They are "dependent" economically, although legally "contractors." The ambiguity, the paradox, of their position is thus reflected in the term used to identify them. Self-employed truck drivers, peddlers, and taxicab operators, farmers, fishermen, and service station lessees personify the dependent contractor.

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For a variety of reasons, employers may prefer to deal with dependent contractors rather than "employees". The obligations to comply with a variety of social welfare and tax statutes depends on the existence of an employment relationship, and indeed does exposure to vicarious liability or consumer complaints. Conversely, the employer receives the benefit of increased sales or faster service by contractors whose income depends on their own exertions instead of an assured wage. A fluctuating demand

for services is often more economically met by casual arrangements with a dependent contractor than by a burdensome continuing employment relationship. The dependent contractor may work for less. His individual bargaining power is substantially less than that of an organized group of employees. Capital and maintenance costs of equipment can be shifted to the dependent contractor, thereby further enhancing the bargaining power of the employer, while undermining the contractor's ability to withhold his services. Not least of the attractions of dealing with a dependent contractor is his inability to claim the protection [sic] of the labour relations legislation. Finally, the dependent contractor may be used to undermine the union's bargaining power, which stems from its control of the labour supply.

Succumbing to the temptation of these undeniable advantages, employers have sought to transform employees into independent contractors by the magic of contractual language. While many employees have willingly or reluctantly assisted in this exhibition of the black art, they have not always done so. Both situations present legal conflicts.

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As has been suggested, the dependent contractor who sells services doubly disrupts the labour market. On the one hand, he competes with organized employees for available work; on the other hand, his attempts to organize for collective action, lacking statutory sanction, are often characterized by economic force and legal reprisals. Any rationalization of this labour market disorder must begin with abandonment of the traditional legal distinction between employees and independent contractors. Indeed, such a step would be warranted solely on the ground that the legal tests are uncertain:

A contractor may go forth in the morning proud of his independence and return at nightfall a servant, some court having found in the employer such a measure of control of prices, of working conditions, of what not, as no truly independent contractor could countenance. Or a servant may suddenly find that he has so far departed in thought, in time or space from "the scope of his employment" that he has achieved, at least temporarily, the estate of an independent contractor. It is all very confusing.

But, as has been suggested, there are more socially important grounds for abandoning the legal distinction than mere uncertainty or confusion. The legal distinction simply does not conform to economic reality.

Insofar as dependent contractors share a particular labour market with employees, it is submitted, first that they should be eligible for unionization. Such a result would require a new definition of the term "employee," perhaps along the lines of that adopted in Sweden: "For the purposes of this Act a person shall be regarded as an employee even if no normal engagement exists, provided that he performs work for another person

and thereby occupies in relation to that person a position of dependence essentially similar to that occupied by an employee in relation to his employer.”

19. The dependent contractor provision of the Act is intended to apply to persons who have some of the trappings of the independent entrepreneur, but, in reality, are in a position of economic dependence, more like that of an employee. In interpreting the section, the Board has rejected the argument that section 1(1)(h) merely codifies the common law tests. That proposition is clearly untenable, given the academic and legal debate which preceded the 1975 amendment. Instead, the Board has viewed the statutory definition as “a new departure” which may imply that persons who have previously been denied access to collective bargaining can now be brought within the ambit of the Act. (See *Adbo Contracting Company Limited*, [1977] OLRB Rep. April 197). Of course, certain of the common law considerations may still be important; but the Board’s ultimate responsibility is to make a determination on the basis of the statutory definition set out above. As the Board observed in *Superior Sand, Gravel & Supplies Ltd.* [1978] OLRB Rep. February 119 at page 126,

“[the task] is to make the determination by reference to the criteria set out in the statutory definition of dependent contractor. This definition directs the Board to examine the type of economic dependence and the kind of business relationship or obligation that it has before it; and further directs the Board not to give undue emphasis to whether there exists a formal contract of employment, and whether or not a person furnishes his own tools, vehicles, equipment, or machinery. In the final balance, the Board must be satisfied that the relationship before it, even though it may not bear all the hallmarks of the typical employment relationship, more closely resembles the relationship of an employee than of an independent contractor”.

20. In the instant case, there is a strong argument that the “contractors” are employees even on the common law tests applied by the Board in cases preceding the 1975 amendment. In our view, however, it is more appropriate to assess their status in light of the more flexible definition of “dependent contractor” which has now been incorporated into the statute. (But see: *Automatic Fuels Limited*, [1966] OLRB Rep. April 22, *Burmack Burner Service* [1969] OLRB Rep. October 850, *Shell Canada Limited*, [1974] OLRB Rep. April 200, and *Gulf Oil Canada Limited*, [1974] OLRB Rep. April 245 which preceded the legislative amendment. Each of these cases involved persons working under conditions similar to those of the contractors with which we are here concerned, and in each case the Board found them to be “employees” within the meaning of the Act.)

21. How are the contractors to be viewed in the light of the statutory criteria? It is apparent that the income of all of the contractors is directly and substantially dependent upon the work which they perform for Francis and its customers. In all but one case, these provide the sole source of work and income, and the exception involved only one individual performing minor services for friends and neighbors. There is virtually no evidence of business development, self-promotion, or entrepreneurial initiative. The evidence discloses little inclination or ability on the part of the contractors to expand their business horizons. They do not compete for customers in the market. Such new customers as they do solicit are likely to become as tied to Francis as they are themselves. The fact that they derive a benefit from

attracting new customers to Francis is no more determinative of independent contractor status than it would be for commission salesmen. The fact is, that the contractors have not generally provided services to independent customers of their own, and if the contract is terminated, all of Francis' customers — including those which the contractor may have attracted — will be beyond reach. The non-competition covenant ensures that this will be the case. At the present time at least, the contractors' economic mobility, and freedom to contract with others and develop their "business" are largely theoretical.

22. The contractors are very closely tied to Francis, which totally governs the rhythm of their work patterns. It is Francis which controls their relationship with its (and their) customers. Francis prescribes in detail the kind of services to be provided, the work methods and procedures and to a great extent, when, where, for whom and at what price the contractors will work. The contractors do not dispose of their work or services on their own account, nor are they free to set their own fees. Any job of value greater than \$150.00 is routed through, and vetted, by Francis. The contractors' economic independence is severely and substantially circumscribed. Indeed, the possibility of termination of their service contract at the sole discretion of Francis, and upon 24 hours notice, renders the contractors even more vulnerable than Francis' unionized employees whose termination can only be effected if Francis has "just cause".

23. The contractors supply their own tools, — but so do Francis' employees. Half of the contractors obtain their vehicles from Francis as well. Even the system of remuneration — with its "charge-backs", "hold-backs", and a modified form of piece-work payments, — is similar to that of Francis' employees. Both employees and contractors provide similar services, to the same target group of customers. Both are economically dependent upon Francis. On the basis of the evidence, it is clear that the nature of the relationship between Francis and its contractors more closely resembles the relationship of an employer-employee than of an independent contractor. Accordingly, the Board finds that the eight contractors are "dependent contractors" within the meaning of section 1(1)(h) of the *Labour Relations Act*.

24. The Board is satisfied on the basis of all of the evidence before it that more than fifty-five per cent of the employees of the respondent in the bargaining unit at the time the application was made, were members of the applicant on May 20, 1981, the terminal date fixed for this application, and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act. If it considered only that membership evidence, the Board would be disposed to certify the applicant without recourse to a representation vote. However, there were also before the Board, five individual statements of desire, signed by certain of the dependent contractors, indicating that they had had a change of heart and now no longer wished to support the union's application. These statements included one from Darrell Francis, and all of them were filed prior to the terminal date (and, of course, prior to the initial hearing in this matter). It was for this reason that the Board did not consider it inappropriate to permit the amendment of the respondent's list to include Darrel Francis as a person potentially affected by the application. Not only had Francis intervened in the proceeding *prior* to hearing, it is obvious that an appointment of an officer to inquire into the employee list and composition of the bargaining unit necessarily means that the number and status of the individuals falling within the unit remains uncertain until finally settled by the Board. Moreover, if the Board ultimately decided to order a representation vote, the issue of Darrell Francis' status would surface again in respect of his entitlement to vote. In all of the

circumstances, the Board considered it appropriate to resolve his status along with that of the other contractors (although in his case, it is recognized that there is an even stronger argument that he is a "pure" employee and not even a dependent contractor).

25. If the Board were satisfied that the statements of desire filed by some of the dependent contractors, represented the voluntary wishes of those who signed them, it would exercise its discretion to seek the confirmatory evidence of a representation vote to determine the employees' current wishes with respect to trade union representation. But the objecting dependent contractors have not yet had the opportunity to address the Board with the respect to these issues, or to lead evidence with respect to the voluntariness of their statements of desire. Consequently, it will be necessary to schedule a further hearing so that they will have an opportunity to deal with these issues and to lead evidence in accordance with Rule 48(5) of the Rules of Practice concerning the origination and preparation of their statements of desire.

26. The matter is referred to the Registrar.

0089-81-R Local 47 Sheet Metal Workers' International Association, Applicant, v. Irvcon Roofing & Sheet Metal (Pembroke) Ltd., Respondent.

Bargaining Unit – Construction Industry – Whether employees not qualifying under *Apprenticeship and Tradesmen's Qualification Act* included in sheetmetal workers bargaining unit – Effect of Act on Construction Industry bargaining units relating to certified trades considered

BEFORE: D. E. Franks, Vice-Chairman, and Board Members F. W. Murray and O. Hodges.

APPEARANCES: *Arthur L. Moore and Robert Belleville for the applicant; R. A. Werry for the respondent.*

DECISION OF THE BOARD; November 5, 1981

1. The Board finds that the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act* and is an affiliated bargaining agent of a designated employee bargaining agency. Pursuant to the designation issued by the Minister under section 139(1) of the Act on April 12, 1978, the designated employee bargaining agency is the Sheet Metal Workers' International Association and The Ontario Sheet Metal Workers' Conference consisting of Locals 30, 47, 235, 392, 397, 473, 504, 537, 539, 562 and 629 of the Sheet Metal Workers' International Association.

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3. The Board further finds that this is an application for certification within the meaning of section 119 of the *Labour Relations Act* and is an application made pursuant to section 144(1) of the Act which provides that:

An application for certification as bargaining agent which relates to the industrial, commercial and institutional sector of the construction industry referred to in clause 117(e) shall be brought by either,

- (a) an employee bargaining agency; or
- (b) one or more affiliated bargaining agents of the employee bargaining agency,

on behalf of all affiliated bargaining agents of the employee bargaining agency and the unit of employees shall include all employees who would be bound by a provincial agreement together with all other employees in at least one appropriate geographic area unless bargaining rights for such geographic area have already been acquired under subsection 3 or by voluntary recognition.

4. The Board appointed a Labour Relations Officer to inquire into the list and composition of the bargaining unit in the present case. The Labour Relations Officer has made his report and the parties made their representations to the Board on that report. At issue between the parties is the specific language which the Board should use to describe the appropriate bargaining unit. The application is an application with respect to sheet metal workers. Simply put, the respondent employer takes the position that the Board should describe the bargaining unit in terms of "sheet metal workers and sheet metal workers apprentices" in the appropriate board geographic area. The applicant trade union, however, takes the position that the appropriate bargaining unit should be described in terms of "journeymen sheet metal workers and registered apprentices" in the appropriate area.

5. The Labour Relations Officer's report deals with three disputed employees. The report is clear that the three employees were, on the date of application, working at the sheet metal trade. The report, however, is also clear that none of the three employees were certified as journeymen sheet metal workers nor were they registered apprentices within the meaning of *The Apprenticeship and Tradesmen's Qualification Act*, R.S.O. 1970, c. 24. It is further clear that sheet metal worker is a certified trade within the meaning of *The Apprenticeship and Tradesmen's Qualification Act*.

6. The present case raises a significant policy problem with respect to bargaining units in the construction industry. A review of previous Board certificates granted to the sheet metal workers union indicates that in a number of situations the Board has described such units as "all sheet metal workers and sheet metal workers apprentices". In other cases the Board has described the bargaining unit as "all journeymen sheet metal workers and sheet metal apprentices". In only one case apparently, on agreement of the parties, was the unit described as "all journeymen sheet metal workers and registered apprentice sheet metal workers". In the present case therefore the applicant trade union is asking the Board to develop a practice of describing the appropriate bargaining unit as referring to "journeymen sheet metal workers and to registered sheet metal apprentices". The applicant's reason for making such a request relates directly to *The Apprenticeship and Tradesmen's Qualification Act*. According to that Act, a person who is neither a journeyman sheet metal worker nor a registered apprentice is prohibited from lawfully working at the sheet metal trade. Thus, at the hearing in this matter, the representative of the sheet metal workers union clearly admitted that such persons would

not be taken into membership, and further would be outside the ambit of the collective agreement to which the sheet metal workers union is party.

7. In the context of the present case, of course, to adopt the applicant's position would mean that the employees in question are not employees in the bargaining unit. They would not be entitled to any voice in the determination as to whether the applicant trade union should be entitled to represent sheet metal workers, but it also follows that if the applicant trade union were certified they would not be able to continue as employees unless they became registered apprentices.

8. The respondent takes the position that the employees in question are working in the sheet metal industry and should therefore be included in the count.

9. We are of the view that the disputed employees should not be listed as employees in a bargaining unit. Section 10 of *The Apprenticeship and Tradesmen's Qualification Act* is quite clear:

"10.-(1) The Lieutenant Governor in Council may designate any trade as a certified trade for the purposes of this Act, and may provide for separate branches or classifications within the trade.

(2) No person, other than an apprentice or a person of a class that is exempt from this section or a person referred to in subsection 4, shall work or be employed in a certified trade unless he holds a subsisting certificate of qualification in the certified trade.

(3) No person shall employ any person, other than an apprentice or a person of a class that is exempt from this section or a person referred to in subsection 4, in a certified trade unless the person employed holds a subsisting certificate of qualification in the certified trade."

By Regulation 298/73 the Lieutenant Governor in Council designated the trade of sheet metal worker as a certified trade for the purposes of that Act. It is our view that the appropriate bargaining unit for collective bargaining with respect to sheet metal workers should reflect that designation. Accordingly, in the present case the bargaining unit shall be described in terms of "journeymen sheet metal workers and registered sheet metal apprentices". It follows, therefore, that the three employees in question will not be employees on the list of employees for the purposes of the count.

10. The Board further finds pursuant to section 144(1) of the Act, that all journeymen sheet metal workers and registered sheet metal apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all journeymen sheet metal workers and registered sheet metal apprentices in the employ of the respondent in all other sectors in the County of Renfrew, save and except non-working foremen and persons above the rank of non-working foreman, constitute a unit of employees of the respondent appropriate for collective bargaining.

11. The Board is satisfied on the basis of all the evidence before it that more than fifty-five per cent of the employees of the respondent in the bargaining unit, at the time the

application was made, were members of the applicant on April 21, 1981, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

12. Section 144(2) of the Act, which states in part as follows, provides for the issuance of more than one certificate if the applicant has the requisite membership support:

... the Board shall certify the trade unions as the bargaining agent of the employees in *the bargaining unit* and in so doing shall issue a certificate confined to the industrial, commercial and institutional sector and issue another certificate in relation to all other sectors in the appropriate geographic area or areas.

Therefore, pursuant to section 144(2) of the Act, a certificate will issue to the applicant affiliated bargaining agent on its own behalf and on behalf of all other affiliated bargaining agents of the employee bargaining agency named in paragraph 2 above in respect of all journeymen sheet metal workers and registered sheet metal apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.

13. Further, pursuant to section 144(2) of the Act, a certificate will issue to the applicant trade union in respect of all journeymen sheet metal workers and registered sheet metal apprentices in the employ of the respondent in the County of Renfrew, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman.

1215-81-JD Joseph Brant Memorial Hospital, Complainant, v. International Union of Operating Engineers, Local 772, and Canadian Union of Public Employees, Local 1065, Respondents

Jurisdictional Dispute – Operating Engineers' Union and CUPE representing employer's stationary engineers and service employees respectively – Equipment conversion making stationary engineers unnecessary – Stationary engineers reclassified to perform maintenance work – Which of two unions having bargaining rights

BEFORE: R. O. MacDowell, Vice-Chairman, and Board Members D. B. Archer and W. G. Donnelly.

APPEARANCES: *D. W. Brady, W. J. Lyall and D. L. Bugsis for the complainant; F. G. Grigsby and E. J. Herechuk for International Union of Operating Engineers, Local 772; and M. Hikl, R. Quinn and D. Reid for Canadian Union of Public Employees, Local 1065.*

DECISION OF THE BOARD; November 6, 1981

1. This is an application under section 91 of the *Labour Relations Act*. Since this is the second application before the Board involving these parties, it may be useful to briefly set out some of the history of their relationship, and the context in which the present proceeding arises.

2. In 1962, the International Union of Operating Engineers (IUOE) was certified as the bargaining agent for the four stationary engineers then employed by the applicant. The bargaining unit was framed as a "craft unit" referring only to "stationary engineers". Shortly thereafter, the IUOE applied to be certified as the bargaining agent for the hospital's maintenance employees, but the Board found that this employee group did not constitute an appropriate bargaining unit, and the application was dismissed. Subsequently, the Canadian Union of Public Employees (CUPE) was certified to represent all of the hospital's service employees including certain skilled trades and employees engaged in maintenance work. The two bargaining units have existed side by side for many years. Over time, a practice evolved whereby certain maintenance functions came to be performed by members of both units. Both collective agreements recognize this practice. Until January 1979, jurisdiction over maintenance work has been shared by the IUOE and CUPE.

3. From 1976 to 1978, the hospital employed seven stationary engineers. Four of these were employed exclusively in the boiler-room on regularly scheduled shifts. The other three were primarily engaged in maintenance work, but worked in the boiler-room on a "relief" basis when any of the four regular boiler-room employees was on vacation, sick leave, etc. Because of the equipment then in place, a stationary engineer holding a valid provincial licence had to be in the boiler-room at all times and all persons working in the boiler-room had to have a thorough understanding of steam and pressure vessels. These qualifications were required of all seven stationary engineers then employed by the hospital, even though the three engineers ordinarily engaged in maintenance work were only in the boiler-room on a sporadic basis (perhaps ten to fifteen per cent of their time). Prior to 1979, all seven members of the IUOE were employed because they were stationary engineers.

4. As we have already mentioned, the three "fill-in" stationary engineers were not the

only employees engaged in general maintenance. Two or three employees represented by CUPE were also used to perform routine maintenance jobs around the hospital. In addition, specialized work was done by the CUPE skilled trades group (plumbers, electricians, etc.). In the negotiations preceding the 1976-1978 agreement, the IUOE tried to secure exclusive jurisdiction over general maintenance work, but the hospital opposed this submission, and eventually it was agreed that the hospital would retain its discretion to allocate the maintenance work to members of both unions.

5. In 1977, the hospital began to consider the conversion of its boiler-room to a newer and safer coil tube system. The conversion was completed on or about January 1st, 1979. The operation and maintenance of the new system did not require stationary engineers. Of the seven stationary engineers employed in January 1979, four were reclassified as "maintenance mechanics", one retired, and two left to find work elsewhere where they could maintain their skills and status as stationary engineers. The hospital has treated those who remained as maintenance employees falling within the CUPE unit. CUPE agreed to waive the job posting requirements in its agreement, and to accept the four individuals into membership. By agreement, they maintained their seniority rights, which they were then permitted to exercise within the CUPE bargaining unit. Had they not been prepared to accept this reclassification, they would have been laid off and the maintenance work performed by other CUPE members. One of the stationary engineers who joined the CUPE local in 1979, is now the local union president.

6. The applicant's general maintenance group now consists of four stationary engineers formerly represented by the IUOE, and two other employees who have always been represented by CUPE. No longer is anyone permanently located in the boiler-room, nor do provincial regulations now require it. All six maintenance employees do visit the boiler-room from time to time, to check the water pressure and coil temperature, inspect the equipment, check the panels for alarms or warning lights, do a water analysis, or adjust the chemical feeds; however, these duties only occupy one person for about 1 or 1-1/2 hours on the day shift and about 3/4 of an hour on the night shift. Innovation has substantially reduced the skill content of the job. It no longer requires the training and experience of a stationary engineer. The hospital maintains that since 1979 when the equipment was converted, there has been no work for stationary engineers, and the IUOE has represented an empty bargaining unit. The IUOE claims that it continues to represent those employees now doing maintenance work.

7. The last jointly negotiated collective agreement between the hospital and the IUOE expired on March 31, 1978, however the elimination of the hospital's need for stationary engineers did not wipe out the IUOE's bargaining rights and the IUOE continued to press for a new collective agreement. When negotiations broke down, a Board of Arbitration constituted pursuant to the *Hospital Labour Disputes Arbitration Act* prescribed a collective agreement running from April, 1978 to March 31, 1980. It was clear that this agreement could apply for the period between April 1, 1978 and December 31, 1978, since the conversion of the boiler system had not been completed. Thereafter, however, the stationary engineers remaining in the hospital's employ were treated for all purposes as falling within the maintenance classification in the CUPE collective agreement. Dues were deducted for these employees and remitted to CUPE. No dues were deducted on behalf of the IUOE. The hospital claims that from January 1979 on, the IUOE agreement was "academic".

8. While the reclassification of the stationary engineers was accepted by the IUOE

members, it was not accepted by the union itself. On August 13, 1979, the IUOE filed a policy grievance alleging the non-remittance of dues in respect of *six* "maintenance" employees. This grievance was not pressed to arbitration; however, a further grievance to the same effect was filed on March 31, 1981. On March 4, 1980, the IUOE gave notice of its desire to renegotiate a new collective agreement. The hospital responded that there was nothing to negotiate since the bargaining unit had been vacant for more than a year. Some eight months later, on February 18, 1981, the union again wrote to the hospital requesting a resumption of negotiations. At a subsequent meeting on March 13, 1981, the hospital reiterated its position that further bargaining was pointless. On April 10, 1981, the union applied for conciliation which was granted on May 13, 1981.

9. After the meeting with the IUOE but before a conciliation officer had been appointed, the hospital filed a termination application with the Board. The hospital argued that only a declaration terminating the IUOE's bargaining rights, would avoid what it characterized as a "pointless merry-go-round" of bargaining and mandatory interest arbitration. In its view, there were no employees in the bargaining unit, and no job classifications, vacant or otherwise, that could be covered by any collective agreement with the operating engineers. The hospital urged the Board to terminate the union's bargaining rights.

10. For reasons more particularly set out in its decision of August 12, 1981 (Reported in [1981] OLRB Rep. Aug. 1151) the Board dismissed the hospital's application, — holding that the termination provisions of the Act did not apply to the rather unusual circumstances of the case. But the Board was not unsympathetic to the hospital's dilemma, and noted that the jurisdictional dispute provisions of the Act might provide a remedy. The present application was filed on September 1, 1981.

11. The relevant provisions of the Act are as follows:

91(1) The Board may inquire into a complaint that a trade union or council of trade unions, or an officer, official or agent of a trade union or council of trades unions, was or is requiring an employer or an employers' organization to assign particular work to persons in a **particular trade union or in a particular trade, craft or class rather** than to persons in another trade union or in another trade, craft or class, or that an employer was or is assigning work to persons in a particular trade union rather than to persons in another trade union, and it shall direct what action, if any, the employer, the employers' organization, the trade union or the council of trade unions or any officer, official or agent of any of them or any person shall do or refrain from doing with respect to the assignment of work.

(15) The Board may in its discretion, or at any time following the release of its direction, alter the bargaining unit determined in a collective agreement as it considers proper, and the certificate or agreement, as the case may be, shall be deemed to have been altered accordingly.

(16) The Board may, upon the application of any person, employer, trade union, council of trade unions or employers' organization affected by a decision of a tribunal referred to in subsection (14), alter the bargaining unit determined in certificate or defined in a collective agreement as it considers proper to enable the parties to conform to the decision of the tribunal, and the certificate or agreement, as the case may be, shall be deemed to have been altered accordingly.

(18) Where an employer is a party to or is bound by two or more collective agreements and it appears that the description of the bargaining unit in one of such agreements conflicts with the description of the bargaining unit in the other or another of such agreements, the Board may, upon the application of the employer or any of the trade unions concerned, alter the description of the bargaining units in any such agreement as it considers proper, and the agreement or agreements shall be deemed to have been altered accordingly.

12. The hospital argues, as it did on the earlier termination application, that unless the Board grants the hospital relief under section 91, it will be compelled to engage in protracted, costly, and pointless negotiations. In the hospital's submission, it is trapped on a meaningless treadmill from which it cannot escape without the assistance of the Board. The hospital urges the Board to use the broad powers conferred upon it by sections 91(14) and 91(15) to erase the IUOE's bargaining rights.

13. The IUOE argues that its bargaining unit is not now and never has been vacant. The hospital continues to employ individuals who continue to hold their licence as stationary engineers. Stationary engineers are continuing to perform maintenance work in much the same way as they did prior to January 1979. The change, argues the IUOE, is that two CUPE members who are not stationary engineers are now doing work in the boiler-room. The IUOE does not ignore the fact of the conversion to new equipment, but maintains that its members remain entitled to perform the maintenance work as they did before, and seeks a Board direction to this effect. The practical result of such direction of course, would be to create the very kind of "maintenance" bargaining unit which the Board refused to create in 1962, and since the IUOE now claims *exclusive* jurisdiction over maintenance, would remove from the CUPE bargaining unit a body of work to which some of its members also have a claim. Moreover, there is no indication that the persons performing the work, (who are now all members of CUPE) have any interest in being represented by the IUOE. Since the same individuals are doing the maintenance work, there is no question of directing the hospital to assign it to anyone else. Rather, the IUOE seeks a direction that the hospital recognize its status or rights respecting the employees doing that work.

14. The evidence discloses that both CUPE and the IUOE are claiming the same body of maintenance work, and accordingly, there is a jurisdictional dispute within the meaning of section 91(1) of the Act. It is our view that in the rather unusual circumstances of this case, CUPE has the stronger claim. The employer has always retained the jurisdiction to assign the work as it sees fit and neither union has ever had a monopoly. The nature of the maintenance work does not require the skills of a stationary engineer. It can be performed safely, efficiently,

and economically by less skilled unlicensed employees. Indeed, even before the conversion of the boiler-room, the stationary engineers engaged in maintenance work, were only engaged for a small portion of their time in work for which their licence and specialized expertise was necessary. Now, semi-skilled work of the kind formerly done by CUPE and IUOE members interchangeably, is the only kind of work available. Technological change has made the special skills of a stationary engineer superfluous to the applicant's operation. That is why, following conversion, two of the stationary engineers left to seek work elsewhere where they could continue to work in their recognized job territory.

15. The *Labour Relations Act* accords a special status to craft bargaining units, but it does not guarantee their continued preservation when the craft basis for them has been eroded or disappears. That is essentially what has happened in the instant case, and we are satisfied that the most appropriate resolution to this application would be for the Board to affirm CUPE's entitlement to the maintenance work in dispute, and redefine the IUOE's bargaining unit so that it applies only to persons engaged to performing tasks for which a licence stationary engineer is required. Accordingly, the Board directs:

- a) that the general maintenance work formerly shared by members of CUPE and the IUOE, but not requiring the specialized training and licence of a stationary engineer, shall henceforth be assigned exclusively to members of CUPE;
- b) that the routine maintenance, observation and related duties in the boiler-room, formerly performed by members of the IUOE but now no longer requiring a licensed stationary engineer, shall likewise be assigned to members of CUPE;
- c) that the scope clause in the latest collective agreement between the applicant and the IUOE shall be amended so that it reads as follows:

"This agreement shall apply to all stationary engineers engaged in activities for which a licensed stationary engineer is required (hereinafter called "employees") employed in the Joseph Brant Memorial Hospital at Burlington, Ontario, save and except supervisors and personnel above the rank of supervisor".

These directions will resolve the jurisdictional dispute, and restrict the IUOE's bargaining rights to work requiring a licensed stationary engineer. Since there are no employees engaged in such work at the present time, and no likelihood that anyone will be so employed in the future, the IUOE's bargaining unit is and will likely remain vacant. This does not mean that, as a matter of law, the IUOE's bargaining rights are terminated. While that is what the applicant requested, we do not think that result can be obtained under section 91. On the other hand, since there are currently no members in the bargaining unit for the union to represent, and little likelihood that there ever will be, continued bargaining would be meaningless charade which the hospital could quite properly ignore. In any event, despite the tenacity which the IUOE has demonstrated heretofore, in light of this decision, it is inconceivable that it would continue to engage in a pointless exercise which could have no tangible benefits to anyone.

0796-81-M International Association of Heat and Frost Insulators and Asbestos Workers, Local 95, Applicant, v. **Lewis Insulation Services Inc.**, Respondent, v. The Master Insulators' Association of Ontario, Incorporated, Intervener.

Construction Industry Grievance – Evidence – Ambiguity in clause of collective agreement – Interpretation of “location” in phrase “job site location” – Board permitting extrinsic evidence

BEFORE: N. B. Satterfield, Vice-Chairman and Board Members J. A. Ronson and H. Kobryn.

APPEARANCES: *S.B.D. Wahl and B. McQueen for the applicant; R. A. Werry for the respondent and the intervener.*

DECISION OF THE BOARD; November 10, 1981

1. The Board issued an interim decision July 30th, 1981 dealing with certain procedural issues in this referral of a grievance in the construction industry under section 124 of the *Labour Relations Act*. At the commencement of the proceedings when the application came back on for hearing on its merits, Mr. Werry, solicitor for the respondents, advised the Board that he would be seeking to call extrinsic evidence at the appropriate stage of the proceedings. After the applicant had completed its evidence in chief, counsel for the respondents requested that he be permitted to call extrinsic evidence on the grounds that Article X – Living Allowance and Travelling Expenses — of the collective agreement between the International Association of Heat and Frost Insulators and Asbestos Workers and the International Association of Heat and Frost Insulators and Asbestos Workers, Local 95 and The Master Insulators' Association of Ontario, Inc., (“the agreement”) effective from September 10, 1980 until April 30, 1982, contains patent and latent ambiguities. The Board heard the parties' representations and ruled that it would allow extrinsic evidence. As a consequence of the Board's ruling, the parties ultimately agreed that the proceeding should be adjourned until another date and requested the Board to consent to the adjournment and, as well, to issue an interim decision stating the nature of the difficulty caused for the Board by the ambiguities in Article X. The Board consented to the adjournment and this interim decision is in response to the second part of the parties' request.

2. Article X provides, *inter alia*, payment of a living allowance to certain eligible employees when they are working a sufficient distance from their residences. The article provides for living allowance to be paid, depending upon the particular circumstances, by either the employer or a trust fund set up for that purpose. The central issue in the grievance is whether payments made to certain individual grievors from the trust fund, on application of the respondent, should have been made by the respondent and not by the trust fund. The answer to this question would seem to rest with the interpretation of the phrase “job site location” in the applicable clause or clauses of Article X, particularly clause 10.06. It was the use of that phrase throughout the article, together with the phrases “job site”, “job location” and “job situation” and the word “job”, which the Board found to be ambiguous.

3. Article X is comprised of 17 clauses. The phrase “job site location” appears in nine of these clauses and in one of them twice. The applicant argues that wherever the phrase “job

site location” is used it means simply the specific site at which there is work to be performed by employees for the employer, or in this grievance, the respondent. Respondent counsel takes the position that the word “location” in that phrase as it appears in clause 10.06 is capable of multiple meanings and therefore there is a patent ambiguity on the face of the agreement. Counsel argues further that, if the meaning attributed by the applicant to the phrase “job site location” is the correct meaning, then the phrase has the same meaning as the word “job” and the phrase “job site”. Therefore, according to respondent counsel, the word “location” could be deleted from the phrase “job site location” without affecting the meaning of the Agreement, except to make clause 10.17 a nullity.

4. The problem for the Board is that the use of the word location in the phrase “job site location” is capable of a host of meanings and, therefore, so is the entire phrase. At least one of these meanings would make the phrase synonymous with the word “job” or the phrase “job site”.

5. The noun “location” is given the following meanings in two popular dictionaries:

The Concise Oxford Dictionary:

“... (position in) a particular place;”

Webster's Third New International Dictionary (unabridged):

“a position or site occupied or available for occupancy (as by a building) or marked by some distinguishing feature (such as in: ... a sheltered location; ... discovered the location of the hiding place; or ... much of the charm of the house was in its location)”.

As those meanings indicate, a “location” could be a very precise location as in the hiding place for some valuable possession like a piece of jewelry, or it could be a large area like a promontory of land on which a house is located affording an unobstructed view of the surrounding area. In a similar way the word “location” in the phrase “job site location” is capable of a host of meanings ranging, for example, from one floor of a specific structure on which there is work to be performed by employees of the employer, to a defined geographic location in which the employer may have several projects on which there is work to be performed. Some of the potential meanings may be eliminated by the simple application of the rules of construction used in the interpretation of documents, but the Board has not yet reached that stage where it can begin applying those rules. Therefore, this range of possible meanings which could be given to the word “location” is a reasonable indication of the magnitude of the problem facing the Board. While the problem is focused primarily on clause 10.06, however the Board construes the phrase its construction must be compatible with the use of the phrase in eight other clauses, including the one in which it is used twice, as well as with the apparently similar terms like “job site,” “job location” and “job situation”.

6. The Board in the final analysis will have to rely on all of the evidence, that which it has already heard as well as any further evidence, including admissible extrinsic evidence.

1175-81-R Vick Diorenzo, Applicant, v. United Electrical, Radio and Machine Workers of America and its Local 512, Respondent, v. **Matsushita Industrial Canada Limited**, Intervener

Petition – Termination – Lead-hand within bargaining unit organizing petitions – Whether perceived as managerial – Whether petitions voluntary

BEFORE: R. O. MacDowell, Vice-Chairman, and Board Members B. L. Armstrong and J. A. Ronson.

APPEARANCES: *R. B. Cumine, Q.C. and V. Diorenzo for the applicant; A. E. Jenkyn, F. Davis and A. Rees for the respondent; J. R. Hassel, H. Hemas and E. Tomajko for the intervener.*

DECISION OF THE BOARD; November 16, 1981

1. This is an application for termination of the respondent union's bargaining rights. The parties are agreed that the application is timely. The principal issue before the Board is whether not less than forty-five per cent of the employees represented by the respondent have voluntarily signified in writing that they no longer wish to be represented by the union.

2. The intervener, Matsushita Industrial Canada Limited ("Matsushita") operates a plant in the Municipality of Metropolitan Toronto. The respondent union has been the bargaining agent of its employees for about eighteen months. By a decision dated April 8, 1980, the Board certified the respondent as the employees' bargaining agent, following a pre-hearing representation vote in which 116 employees indicated support for the respondent, and 75 employees indicated their opposition. This substantial dissenting group may be significant in light of subsequent events; for it is apparent that a significant core of the intervener's employees remained unconvinced about the benefits of trade union representation. Their numbers were augmented by new employees or employees who, for one reason or another, came to doubt the value of the union.

3. In support of this application, the applicant filed a series of petitions signed by some 70% of employees currently represented by the respondent. The form of the petition unequivocally indicates that the signatories no longer wish to be represented by the union in their employment relationship with the intervener. The issue before the Board is whether this series of petitions, signed by at least 150 of the intervener's employees, is a voluntary expression of their wishes.

4. Vick Diorenzo, the nominal applicant in this matter, has been opposed to the union from the outset — a fact which was known around the plant. In the months preceding this application, various employees had indicated their own dissatisfaction to him and expressed an interest in displacing the union when it became timely to do so. A number of meetings were held to enlist supporters and canvass the depth of employee opposition to continued union representation. Eventually, the objectors contacted a solicitor who prepared the petition documents supporting this application, and explained how the signatures on that petition should be solicited. In particular, the solicitor suggested that the document should not be circulated on company premises or company time, and that neither Diorenzo nor any other

“group leader” should be involved. The solicitor explained the importance of a rigid adherence to these “rules” in order to avoid any question concerning the voluntariness of the petition.

5. Following the meeting with the solicitor, the petition documents were distributed to various employees who had indicated their willingness to help. Because of the size of the plant and the number of employees who had little facility with the English language, it was necessary to enlist a number of individuals from various ethnic backgrounds to actually circulate the document. Each of these individuals was instructed that such circulation should not take place on company premises or company time, that there should be no threats or promises, and that persons who might conceivably be perceived as “managerial” should not be involved.

6. Much of the evidence adduced before the Board, over several days of hearing, concerned the solicitation of signatures on the petition. Each of the employees involved gave evidence concerning the circumstances under which each of the signatures was obtained. In many cases, this evidence had to be adduced through an interpreter, and each case, the witness was carefully cross-examined. Not surprisingly, there were some inconsistencies and lapses of memory. The recollection of the witnesses called by the applicant did not always coincide with that of the union’s witnesses who gave evidence, and, we are satisfied that one witness, Francis Aird, was not being candid about the location where the signatures he witnessed had been solicited. So anxious was he to convince the Board that he had “followed the rules”, and that no signatures had been solicited at the plant — so long as they were not obtained with the assistance, or in the presence of members of management. There is no such evidence. On the contrary, when the evidence is viewed in its totality, we are satisfied that the petition was circulated in circumstances which do not detract from its voluntariness.

7. The union contends that Vick Diorenzo, the applicant, and the key individual in originating the termination application, is a member of management and, consequently, not entitled to initiate these proceedings. In the alternative, the union argues that Diorenzo could reasonably be perceived as “managerial”, so that the Board should, in any event, doubt the voluntariness of the employee expression in opposition to the union. The union makes a similar argument with respect to one Lito Dahill. The union alleges that in several instances, Dahill participated in discussions with employees about the petition and encouraged them to sign it.

8. Diorenzo and Dahill are “group leaders” (“lead hands”) who exercise certain coordinating and supervisory functions vis-a-vis other members of the bargaining unit. There are about 15 groups leaders in all. There are varying numbers of employees in each “group”. But the group leaders are clearly members of the bargaining unit. Their position is expressly recognized by the collective agreement which establishes a group leader premium. All of the group leaders pay union dues. Some of the group leaders signed the petition; others did not. One of the group leaders (with some 22 employees in his group) is a union steward! Diorenzo has occupied his position for several years (i.e. prior to the union’s certification) and at no time before the present proceedings has the union ever claimed that he was managerial. Finally, even if the evidence of the union’s witnesses is accepted in its entirety (and we have some doubts about the credibility of some of it), it is clear that Diorenzo and Dahill’s role was entirely peripheral to the circulation of the petition documents. When the evidence is considered as a whole, the Board cannot accept the union’s submissions with respect to Diorenzo and Dahill.

9. On the basis of all of the evidence before it, the Board finds that not less than forty-five per cent of the employees in the bargaining unit have voluntarily signified in writing that they no longer wish to be represented by the union. Accordingly, pursuant to section 57(3) of the Act, the Board directs that a representation vote be taken so that it may satisfy itself whether a majority of the employees desire that the right of the trade union to bargain on their behalf should be terminated.

10. The bargaining unit which the respondent represents is described as follows:

“all employees of the intervener at its plant at 1475 The Queensway, Toronto, Ontario, or any other television plant within the Municipality of Metropolitan Toronto, save and except forepersons and supervisors, persons above the rank of foreperson and supervisor, office and support staff, persons regularly employed for not more than twenty-four (24) hours per week, and students employed during the school vacation period.

Those entitled to cast a ballot in the representation vote will be all employees of the intervener in the bargaining unit on the date hereof, whose employment is not terminated between the date hereof and the date on which the vote is taken.

11. Voters will be asked to indicate whether or not they wish to be represented by the respondent in their employment relations with the intervener.

12. The matter is referred to the Registrar.

2226-80-R Canadian Union of Public Employees, Applicant, v. Owen Sound Public Utilities Commission, Respondent

Employee Reference – Employee status of foremen deferred for resolution at negotiations – Board certificate excluding foremen from unit – Union failing to raise issue at negotiations – Whether section 106(2) application proper after collective agreement signed

BEFORE: R. O. MacDowell, Vice-Chairman, and Board Members M. J. Fenwick and J. A. Ronson.

APPEARANCES: *W. Brown and G. O. McPhee for the applicant; J. A. Gurnham and G. M. Fairfield for the respondent.*

DECISION OF THE BOARD; November 3, 1981

1. This is an application under section 106(2) of the Act. In view of the nature of the dispute which has arisen, it may be useful to briefly review the course of these proceedings to date.

2. A certification application was filed on January 19, 1981. There was no dispute between the parties concerning the description of the bargaining unit, and the union submitted documentary evidence of membership on behalf of well over fifty-five per cent of the employees in that unit. Apparently, there was a dispute between the parties concerning the exclusion of "foremen" from the bargaining unit, however, the parties decided that they would not put that issue to the Board and waived their right to a formal hearing in the matter. By decision dated February 13, 1981, — and without any mention of the foreman issue of which it was then unaware, — the Board issued a certificate to the applicant embodying the bargaining unit description to which the parties had apparently agreed. That bargaining unit description, it will be observed, excludes "foremen".

3. There is no dispute that at the time the above mentioned certificate was issued, there remained an outstanding issue between the parties concerning the status of certain foremen; however, the parties were content to deal with this matter at the bargaining table and by letter dated February 16, 1981, a representative of the applicant wrote to the respondent as follows:

"Dear Sir:

As you are aware, we expect to receive certification shortly from the Ontario Labour Relations Board, for a certain group of your employees.

In a telephone conversation with Mr. J. MacDonald of the Ontario Labour Relations Board, I indicated the classification "Foreman" was a classification we could not agree to exclude or at least not on the basis of the duties and responsibilities that are presently being performed by the persons in that classification.

Mr. MacDonald relayed to you that we were prepared to try to resolve the matter of Foremen during negotiations and if the matter was still outstanding at the conclusion of negotiations between the parties, we would then apply to the Labour Board to assist in resolving the matter.

I was assured by Mr. MacDonald that this arrangement was acceptable to you.

I wish to thank you for your co-operation in this matter. It is appreciated."

4. Bargaining was conducted by Gerald McPhee, another union representative. He told the Board that on the basis of the certificate, he assumed that the foremen were excluded and so instructed the local bargaining committee. While he did not agree with that exclusion, he accepted it and negotiated a collective agreement on that basis. He did not think he was entitled to address the matter.

5. The foreman issue came up at several points in the bargaining. At one meeting, the respondent raised the possibility of adding a further exclusion of temporary employees, and McPhee responded that the union was not prepared to agree to any alteration of the terms in the recognition portion of the Board certificate. McPhee acknowledged the respondent's concern about the temporary employees, but noted that the union was equally concerned

about the exclusion of foremen. For the time being, he said, both parties would have to live with the status quo of the Board certificate. Later, McPhee agreed to a minor alteration of the recognition clause which the parties were then discussing, by substituting the term “foremen” for “foreman”. McPhee told the Board that this alteration was “academic” because, in his view, foremen were excluded and he was negotiating on that basis. The recognition clause in its present form, excluding foremen, was initialed by McPhee as “OK”. The foreman question did not appear on a list of “items remaining in dispute” prepared at the request of a conciliation officer. McPhee admits that, as far as he was concerned, the matter was settled and there was no need to put it on this list of outstanding or unresolved issues.

6. On or about June 29, 1981, following the intervention of the conciliation officer, the parties were able to reach an accommodation, and a formal collective agreement was executed. This agreement contains a recognition clause excluding foremen, but on September 23, 1981, a representative of the applicant wrote to the Board seeking the appointment of a Board officer to inquire into the “employee status” of three named foremen. Not surprisingly, the respondent objected to the appointment on the ground that this issue had been resolved or abandoned, and it was too late to claim that there was any question remaining between the parties. The sections of the *Labour Relations Act* relevant to this matter are as follows:

- 1(3) Subject to section 90, for the purposes of this Act, no person shall be deemed to be an employee,
- (b) who, in the opinion of the Board, exercises managerial functions or is employed in a confidential capacity in matters relating to labour relations.
- 106(2) If, in the course of bargaining for a collective agreement or during the period of operation of a collective agreement a question arises as to whether a person is an employee or as to whether a person is a guard, the question may be referred to the Board and the decision of the Board thereon is final and conclusive for all purposes.

7. In *Westmount Hospital* [1980] OLRB Rep. Oct. 1572, the Board had this to say about the timeliness of applications under section 106(2) (formerly section 95(2)):

“The parties, however, are currently bound by the collective agreement entered into on May 12, 1980. Where parties have by virtue of their collective agreement or other form of agreement settled upon the employment status of a person, the Board at one time refused to let either party at any time withdraw unilaterally from that agreement by means of an application under section 95(2) of the Act. (See, for example, *Belleville General Hospital*, [1975] OLRB Rep. June 487.) The basis for this policy is that a party having entered into an agreement on the status of a particular person, cannot, in the absence of a material change in duties and responsibilities, come before the Board and claim that a “question” exists as to the status of that person. More recently, the Board has liberalized this policy so as to permit an application to be brought during negotiations for the renewal of a collective agreement, after the collective

agreement has expired. Parties therefore are no longer bound indefinitely to the terms of an initial agreement. The Board will not however, permit an application (other than one relating to *changes* in the duties and responsibilities) to be brought during the first set of negotiations following agreement upon the status of the person in question (*Collingwood General Marine Hospital*, [1975] OLRB Rep. Jan. 18). Nor will it permit a full application to be brought during the term of a collective agreement, unless it is satisfied either that the position is a new one arising during the term of the collective agreement, or that the applicant prior to entering into the collective agreement expressly reserved its right to bring a subsequent section 95(2) application on the person in dispute. Otherwise the applicant will be taken to have acquiesced in the position of the other party, and to have accepted it at least for the term of that collective agreement. The Board upon receipt of an application under section 95(2) during the term of a collective agreement therefore automatically limits the appointment of a Board Officer in inquiring into *changes* in the duties and responsibilities since the date the agreement was entered into (e.g. *Ontario Hydro*, [1975] OLRB Rep. July 560). If the applicant feels that the appointment should not be limited to "changes", it may write to the Board setting out its reasons, and the Board may hold a hearing to deal with the proper terms of the appointment."

Thus, where the employment status of a person has been settled by a collective or other form of agreement, the Board will not permit one party to unilaterally repudiate that agreement by an application under section 106(2). If the parties have resolved the status issue by their agreement, neither can claim that a "question" has arisen between them so as to trigger section 106(2). This bar is not absolute, of course, nor would it be applicable where either party has expressly reserved its right to have an outstanding issue determined under section 106(2). This is what the applicant has done by its letter of February 16, 1981, and if there were no other evidence before the Board, the Board would give effect to it, and accede to the union's request. However, it is clear from McPhee's evidence that, despite this reservation, the union subsequently engaged in negotiations and concluded a collective agreement on the basis that the foremen would not be included in the bargaining unit. Indeed, McPhee was quite clear and candid on this point. As far as he was concerned, the issue was resolved. There was no outstanding "question" between the parties, and none was suggested until the union's section 106(2) application almost three months later.

8. In view of the evidence before it, the Board is of the view that it should adopt the approach taken in *Westmount Hospital* and decline to appoint a Board officer. It cannot be said that, in the circumstances, there is any "question" between the parties which must be resolved at this time. The issue has been settled (for the time being at least) by the parties themselves and section 106(2) can have no application.

9. The application is dismissed.

0491-81-R Service Employees' Union, Local 204, A.F.L.-C.I.O.-C.L.C., Applicant, v. Prudent Investments Inc., Respondent.

Collective Agreement – Sale of a Business – Whether memorandum agreeing to recommend settlement to principals constituting collective agreement – Predecessor carrying on business of operating and leasing office space – Respondent purchasing predecessor's land and buildings – Obtaining transfer of leases and cleaning contract – Whether sale of a business – Whether purchaser bound by collective agreement when it does not employ any cleaning staff

BEFORE: Ian Springate, Vice-Chairman, and Board Members D. B. Archer and J. Wilson.

APPEARANCES: *Jeffrey Egner, Eugene Laliberte and Kevin Hebner for the applicant; Derek L. Rogers, F. Kan and Robert Pugh for the respondent.*

DECISION OF THE BOARD; November 18, 1981

1. This is an applicant under section 63 of the *Labour Relations Act*. It is the contention of the applicant, Service Employees' Union, Local 204 ("the union") that there has been a sale of a business by Colborne Holdings Limited ("Colborne") to Prudent Investments Inc. ("Prudent").

2. Prior to May 11, 1981 Colborne owned and operated two office buildings in the City of Toronto. Although fronting on different streets, the two buildings are actually connected to each other. One building, at 67 Yonge Street, is 16 floors high with stores on the ground floor and offices on the remaining 15 floors. The other building, at 6-8 Colborne Street, is a six story office building. Colborne leased out office space in the two buildings, although at the commencement of the events giving rise to these proceedings certain parts of the Colborne Street building were being renovated and accordingly were not leased out. As it happened, Colborne's largest tenant was the union, which leased space at 67 Yonge Street.

3. In 1959 the union was certified to represent Colborne's cleaning employees at 67 Yonge Street. A number of collective agreements were entered into between Colborne and the union, the most recent covering the period of July 1, 1978 to June 30, 1980. The recognition clause in this collective agreement purported to cover employees at both 67 Yonge Street and 6-8 Colborne Street, although in fact a husband-wife team who did all of the cleaning at 6-8 Colborne Street were not treated by the parties as coming within the bargaining unit covered by the collective agreement. Colborne did employ ten cleaning staff at its Yonge Street building who were employed under the provisions of the collective agreement.

4. On July 23, 1980 Colborne and the union met with a Ministry of Labour mediator to try to reach agreement on the terms of a new collective agreement. The union was represented at this meeting by its business agent Mr. Eugene Laliberte. Colborne was represented by Miss Shirley Prisque, who at the time was Colborne's property manager for both 67 Yonge Street and 6-8 Colborne Street. The president of Colborne was Mr. J. Liebman, a resident of Montreal. The evidence indicates that Colborne's property manager in Toronto was accorded a relatively free hand in running the company's day to day affairs, but that Mr. Liebman had always signed collective agreements on behalf of the company.

5. At the July 23, 1980 meeting Mr. Laliberte and Miss Prisque signed a memorandum of settlement, the relevant provisions of which read as follows:

- "1. The parties herein agree to the terms of this memorandum as constituting full settlement of all matters in dispute.
2. The undersigned representatives of the parties do hereby agree to recommend complete acceptance of all the terms of this memorandum to their respective principals.
3. The parties herein agree that the term of the collective agreement shall be from July 1, 1980 to June 30, 1981.
4. The parties herein agree that the said collective agreement shall include the terms of the previous collective agreement which expired on June 30, 1981 [sic] provided, however, that the following amendments are incorporated:

• • •

6. *Article 17 WAGES:* Effective July 1, 1980 increase "Light" classification by 10% (41 cents)

Effective July 1, 1980 increase "Heavy" classification by 10% (47 cents)

N.B. above 10% (38 cents) applies to Article 19d also.

• • •

11. *Article 29 CONTRACTING OUT AND RETIREMENT* (new):

- a) The Employer will not contract out any bargaining unit work which is currently being done by employees."

It should be noted that the collective agreement which expired on June 30, 1980 contained no restriction on the contracting out of bargaining unit work.

6. Sometime during the month of September, 1980 the union's membership ratified the memorandum of settlement. There never was a formal ratification of the memorandum on the part of Colborne. Subsequent to the signing of the memorandum of settlement Miss Prisque started paying employees the wage rates provided for in the memorandum, although when Mr. Liebman became aware of her action he indicated he was unhappy with her for having done so.

7. In August of 1980 Miss Prisque was replaced as Colborne's property manager by

Mr. R. Pugh. On October 27, 1980 Mr. Laliberte forwarded a draft collective agreement to Mr. Pugh along with a request that he "check it through and let us know as soon as possible if it is all right so that we can set a date to sign this contract". Mr. Pugh testified that on receiving the draft collective agreement he checked it over with Mr. Liebman, but that then simply set it aside without taking any action on it. The draft collective agreement appears to have been based primarily on the provisions of the prior collective agreement and the changes referred to in the memorandum of settlement. However, the draft agreement also contained a new grievance-arbitration procedure which had not been referred to in the memorandum of settlement. Mr. Laliberte testified that Mr. Pugh had earlier agreed that he could add a new grievance procedure.

8. During or shortly prior to the month of October, 1980 Colborne began to rent out two additional floors at 6-8 Colborne Street. As a result of this move the company found that its husband-wife team was no longer sufficient to do all the cleaning work in the building, and accordingly it invited proposals for cleaning the building from a number of outside cleaning firms. Colborne ultimately accepted a proposal from United Cleaning Services Limited ("United"), and during October of 1980 United took over responsibility for the cleaning of 6-8 Colborne. In November United proposed that it also take over the cleaning of 67 Yonge Street, which proposal Colborne accepted. Up to this point Mr. Pugh, in addition to his other responsibilities, had been supervising the ten cleaning employees at 67 Yonge Street. Mr. Pugh testified that he had not been able to do an adequate supervisory job, and that a large amount of cleaning equipment as well as an air conditioner had disappeared from the premises.

9. In late November or early December of 1980, Mr. Pugh and Mr. Liebman of Colborne met with Mr. Laliberte and Mr. T. Roscoe, the president of the union. At this meeting, Mr. Liebman sought to get the union to agree to an increase in its rent. Mr. Liebman also advised the union officials that United would be taking over Colborne's cleaning employees and managing the cleaning operation at 67 Yonge Street. For their part, Mr. Roscoe and Mr. Laliberte tried to get Mr. Liebman to sign the draft collective agreement. Mr. Laliberte testified that the agreement was not signed, but that he came away from the meeting with the impression that Mr. Liebman would eventually sign it.

10. Another meeting took place between Mr. Liebman, Mr. Pugh, Mr. Roscoe and Mr. Laliberte early in January, 1981. At this meeting the union requested that the company sign the collective agreement, and when this was not done, both Mr. Roscoe and Mr. Laliberte took the position that the prior collective agreement, together with the memorandum of settlement, constituted a valid collective agreement, a position rejected by Mr. Liebman. Either at this meeting or shortly prior to it, the timing is not clear on the evidence, the union indicated it would not object to having United take over the cleaning at 67 Yonge Street provided the employees did not lose their jobs and that they continued to receive the same pay and benefits.

11. United took over the cleaning at 67 Yonge Street on January 5, 1981. The arrangement entered into between Colborne and United was summarized in a letter written on February 2, 1981 by Mr. Pugh to United. The letter reads as follows:

"After a period of 30 days, it would appear United has been successful in taking control of our janitorial services. I would therefore like to confirm our joint intentions, which we have discussed on several occasions.

- (a) The Contract and price quoted, dated November 7, 1980, we accept. Commencement date January 5, 1981.
- (b) Equipment and materials presently being used for our cleaning services will be purchased by United Cleaning Services. Our inventory of materials has been made, and we will discuss equipment specifically.
- (c) United Cleaning Services will continue to employ our present cleaning staff, at the rates now established. Union dues and employee benefit payments will be paid by United as well as sick pay benefits. United will bill Colborne Holdings Limited on a monthly basis, separate from regular services. Any questions regarding these payments should be directed to our Bookkeeper, Mrs. M. Moore.

We further discussed the need of proper cleaning equipment such as Maid Carts and vacuum cleaners etc., and because of your agreement to purchase same and in consideration of this major purchase Colborne Holdings Limited will agree to a contract for a period of at least 12 months, from the date of this letter, which shall include its successors and, or, assigns, executors or administrators."

United paid about \$2,000.00 to Colborne for the cleaning equipment and materials referred to in paragraph (b) of the letter.

12. As of January 5, 1981 the employees working at 67 Yonge Street were paid by United at the same rates provided for in the memorandum of settlement. On a monthly basis United forwarded to the union, union dues as well as thirty cents for every hour worked so that the union could purchase benefits for the employees. At the end of every month, United billed Colborne for its wage costs, including sick pay, as well as for an additional amount to cover United's overhead, supervisory costs and profit. Mr. Laliberte testified that in matters relating to union dues and benefits, the union dealt with United, but when employees had difficulties with their employment status or United supervisors, he dealt with Mr. Pugh of Colborne. On March 27, 1981 United sent three employees notices of termination. Mr. Laliberte talked to Mr. Pugh about the terminations, and subsequently on April 8th United advised the employees that they should disregard their termination notices.

13. The memorandum of settlement entered into between the union and Colborne on July 23, 1980 stated it was to cover a period ending on June 20, 1981. On April 3, 1981, the union sent Colborne a notice to commence bargaining for a new collective agreement. On April 22, 1981 proposals for a new agreement were forwarded to the company. No negotiations, however, actually took place.

14. On April 15, 1981 a meeting was held in the union's office with Mr. Liebman, Mr. Pugh, Mr. Laliberte and Mr. Roscoe in attendance. At this meeting, Mr. Roscoe again tried to get Mr. Liebman to sign a collective agreement, but Mr. Liebman flatly refused to do so. Mr. Liebman also indicated that Colborne planned on selling its buildings. Either at this meeting, or about the same time, Mr. Laliberte advised Mr. Pugh that he felt the situation with United was not working out, that their deal with respect to United was off.

15. On May 11, 1981 Prudent purchased from Colborne the land and buildings at 67 Yonge and 6-8 Colborne Streets. There is no connection between the principals of Prudent and Colborne. On May 11th, Prudent also acquired from Colborne an assignment of leases in the two buildings as well as an assignment of the cleaning contract between Colborne and United. On the same date, Colborne sent notices to all of its tenants advising them to henceforth pay their rent to Prudent. In that Prudent planned on doing extensive renovation work to the buildings, Colborne also served most of the tenants with notice to vacate.

16. The Buildings at 67 Yonge Street and 6-8 Colborne have continued since their sale to Prudent to be used as rental office buildings. Prudent has contracted out the management of the buildings to a management firm which in turn has hired Mr. Pugh to continue to serve as property manager for both buildings. Prudent has continued to use United to perform the cleaning work. United for its part uses the same employees to do the cleaning work as before under exactly the same terms and conditions. United has continued to forward union dues and thirty cents an hour for benefits to the union.

17. On June 2, 1981 counsel for the union sent Prudent notice to bargain for a collective agreement. This notice was forwarded to Prudent along with a copy of the union's application under section 63.

18. It is the contention of the union that on May 11, 1981 Colborne sold its business to Prudent. The union contends that part of Colborne's business was the provision of cleaning services to its tenants, and that this function was also transferred to Prudent. In this regard, the union's view is that Colborne contracted out only the management of its cleaning staff to United, and not the bargaining unit work itself. Accordingly, contends the union, Colborne and not United, was the true employer of the cleaning staff at the time of the sale. In the alternative, the union submits that even if Colborne had contracted out the bargaining unit work, the union still retained bargaining rights with respect to Colborne. The union further takes the position that the memorandum of settlement, when considered together with the 1978-80 collective agreement, constituted a binding collective agreement and that the serving of notice to bargain on Prudent in June of 1981 had the effect of "freezing" the agreement's terms, including the provision restricting the sub-letting of bargaining unit work. For its part, Prudent contends that the building cleaning aspect of Colborne's operations were transferred to United back in January of 1981, and that accordingly in May of 1981 Prudent could not have acquired Colborne's cleaning business. Prudent further contends that in any event it acquired only assets from Colborne and not its business. Prudent also submits that since Mr. Liebman never ratified the memorandum of settlement, no collective agreement ever followed from the signing of the document.

19. The relevant provisions of the Act are contained in section 63 which provides, in part, as follows:

"63.-(1) In this section,

- (a) "business" includes a part or parts thereof;
- (b) "sells" includes leases, transfers and any other manner of disposition, and "sold" and "sale" have corresponding meanings.

- (2) Where an employer who is bound by or is a party to a collective agreement with a trade union or council of trade unions sells his business, the person to whom the business has been sold is, until the Board otherwise declares, bound by the collective agreement as if he had been a party thereto and, where an employer sells his business while an application for certification or termination of bargaining rights to which he is a party is before the Board, the person to whom the business has been sold is, until the Board otherwise declares, the employer for the purposes of the application as if he were named as the employer in the application.
- (3) Where an employer on behalf of whose employees a trade union or council of trade unions, as the case may be, has been certified as bargaining agent or has given or is entitled to give notice under section 14 or 53, sells his business, the trade union, or council of trade unions continues, until the Board otherwise declares, to be the bargaining agent for the employees of the person to whom the business was sold in the like bargaining unit in that business, and the trade union or council of trade unions is entitled to give to the person to whom the business was sold a written notice of its desire to bargain with a view to making a collective agreement or the renewal, with or without modifications, of the agreement then in operation and such notice has the same effect as a notice under section 14 or 53, as the case requires."

20. As the Board noted in the *Vaunclair Meats Limited* case, [1981] OLRB Rep. May 581, when a business, or part of a business, is sold, or transferred or disposed of, the transferee acquires it subject to the collective bargaining obligations of the transfer. A union holding bargaining rights for employees of the transferor retains those bargaining rights for the employees in a "like unit" to that which existed prior to the transfer, and the transferee must continue to apply any subsisting collective agreement to that unit until the Board otherwise declares. This transfer and continuation of bargaining rights happens automatically upon the sale of all, or part, of the transferor's business. In this sense, a union's bargaining rights are in the nature of a vested right, which by statute, "runs with the business".

21. Colborne carried on the business of operating and leasing out office space at 67 Yonge Street and 6-8 Colborne Street. Prudent purchased from Colborne its land and buildings, and also took an assignment of Colborne's leases and a cleaning contract related to the two buildings. Prudent now carries on the business of operating and leasing out office space at 67 Yonge Street and 6-8 Colborne Street. In our view, there was in fact a transfer of Colborne's business to Prudent so as to amount to a sale of its business within the meaning of section 63. In reaching this conclusion we have considered, but rejected, Prudent's contention that it did not acquire the cleaning part of Colborne's business in that Colborne had previously transferred its cleaning operations to United. An integral aspect of running an office building is the provision of cleaning services either by employing one's own employees to do the work or by retaining an outside contractor to do it. Prudent, just as Colborne before it, must still ensure that the two buildings are kept clean and in our view the union's bargaining rights with respect to cleaning staff employed by Colborne continue to apply with respect to Prudent.

22. This then raises the question of the current status of the union's bargaining rights insofar as they apply to Prudent. Prudent contends that it does not currently employ any cleaning staff in that the people doing the cleaning in its two buildings are employed by United. Assuming this to in fact be the case, we are satisfied that should Prudent directly employ its own cleaning staff in the future, then they would come within a bargaining unit represented by the union. We are further satisfied that any document entered into between Colborne and the union which might be construed as a collective agreement has now expired. Accordingly, Prudent is not currently bound by any subsisting collective agreement with the union.

23. As indicated above, the union's position is that the memorandum of settlement, when considered with the prior collective agreement, together constituted a valid collective agreement, and that the notice to bargain served on Prudent by the union triggered a "freeze" of its terms and conditions under section 79 of the Act. It is now settled law that a memorandum of settlement, with or without other documents incorporated therein by reference, may constitute a collective agreement. In the instant case, however, the memorandum does not purport to bind the parties to a final agreement but states only that the signers of the document "agree to recommend complete acceptance of all the terms of this memorandum to their respective principals". In *Versaservices Limited*, [1972] OLRB Rep. April 306, the Board in dealing with identical language to that contained in the memorandum of settlement now before us made the following comment:

"While it was argued that the Memorandum of Settlement by itself constituted a collective agreement we are unable to agree with that submission because under paragraph 2 of the Memorandum of Settlement it remained for the representatives to recommend complete acceptance to their principals and it is reasonable to assume that in order to conclude the agreement the principals were required to indicate their acceptance."

24. The union contended that the company by paying the wage increase set out in the memorandum effectively ratified the document. Companies by their conduct can in fact indicate that they have ratified the terms of a memorandum of settlement. However, in the instant case, after the wage increase had been introduced by Miss Prisque, Mr. Liebman expressed his displeasure with her actions. Further, the union was aware that Mr. Liebman was the individual who always executed collective agreements on behalf of Colborne, not Miss Prisque, and indeed it pressed him on a number of occasions after the memorandum of settlement had been entered into to sign a collective agreement, but without success. Finally, the union itself appears not to have regarded the memorandum as a final agreement between the parties in that its draft collective agreement contained changes from the wording in the prior collective agreement which had not been set out in the memorandum of settlement. In all of these circumstances, we are satisfied that the memorandum of settlement was never accepted by Colborne so as to constitute a final agreement between the parties and that the provisions of the memorandum were not "frozen" in place by section 79 of the Act when the union served notice to bargain on Prudent.

25. In the preceding paragraphs we have dealt only with the status of the union's bargaining rights insofar as they relate to Prudent. As noted above, at the hearing the parties raised a number of matters relating to the issues of whether the contract awarded by Colborne to United constituted a disposition of part of Colborne's business to United, whether Colborne

and later Prudent were the true employers of the cleaning employees as opposed to United as well as the legal status of the existing arrangement between Prudent and United. These issues raise important questions concerning who is, or was, the true employer of the cleaning staff, as well as the possible applicability of sections 1(4) and 63 of the Act insofar as both Colborne and United, and Prudent and United are concerned. It is clear that any determination of these matters will directly affect the interests of United. United, however, was not named as a respondent in the proceedings and was not represented at the hearing. In these circumstances, we are of the view that any determination with respect to these matters should await a possible future separate proceeding in which United is named as a respondent and is given an opportunity to participate.

26. Having regard to all of the foregoing, the Board declares that there has been a sale of a business from Colborne Holdings Limited to Prudent Investments Inc. The Board further declares that any cleaning staff employed by Prudent are represented by Service Employees' Union, Local 204 and come within a like bargaining unit to that covered by the most recent collective agreement entered into by the union and Colborne Holdings Limited. In that United Cleaning Services Limited was not named as a party in these proceedings, the Board makes no finding as to the true employment status of persons allegedly in that company's employ.

1546-81-R Commercial Workers Union Local 486, Applicant, v. Santa Maria Foods, Respondent, v. Group of Employees, Objectors

Certification – Practice and Procedure – Employer seeking amendment to employee list after Board announced membership count at hearing – Union seeking change in unit description – Board articulating rules intended to prevent manipulation to serve parties' own interests

BEFORE: M. G. Picher, Vice-Chairman, and Board Members H. J. F. Ade and O. Hodges.

APPEARANCES: *Cliff Evans, Jean Claude Legault and Ian Reilly for the applicant; Gary Walker and Italo Rosatti for the respondent; Michael G. Horan and Richard Bone for the objector.*

DECISION OF THE BOARD; November 17, 1981

1. This is an application for certification.
2. The Board finds that the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act*.
3. The Board further finds that all employees of the respondent in Belleville save and except manager, persons above the rank of manager and sales staff, constitute a unit of employees of the respondent appropriate for collective bargaining.
4. A statement of objection was filed in opposition to the application. Following its normal procedure the Board canvassed the parties on their positions respecting the

composition of the bargaining unit. The unit having been established the Board then announced the count of employees in the unit and the union membership count. The numbers disclosed insufficient overlap between the membership evidence and the petition in opposition to the union to cause the Board to conduct a representation vote, as the union was in a certifiable position.

5. Following a brief recess counsel for the respondent sought leave to amend the list of employees. According to his representation a telephone call to the plant made after the Board announced the membership count disclosed that two employees who were described on the lists filed by the respondent as absent on the date of application and who were excluded by the Board's application of the "thirty day rule" had on the same morning advised the company of their impending return on a date within thirty days of the application date.

6. The union's representative then requested the Board to reconsider the composition of the bargaining unit to exclude office and clerical staff. Giving effect to the employer's request would have rendered the petition in opposition numerically relevant. Acceding to the union's motion would have again reduced the overlap between the petition and the union membership evidence to the point where the union would have been certifiable without a vote.

7. The Board's Rules and the certification hearing are ordered precisely to avoid the mischief of either party gerrymandering the employee lists or the structure of the bargaining unit in such a way as to avoid or favour certification, as the case may be. Pursuant to Form 3 of the Board's Regulations an employer is required to provide to the Board, not later than the terminal date, complete lists of employees in the bargaining unit proposed by the union on the date of application. The late filing of lists or the amendment of lists filed can be only by leave of the Board pursuant to its discretion under section 58 of the Rules of Procedure.

8. At the outset of the hearing the Board will generally allow the employer to amend the lists filed to reflect any new information not previously available or to correct any error. During the hearing the Board does not announce the count of employees or any union membership until the description of the bargaining unit is settled. Similarly it does not announce the membership count until the count of employees in the unit is determined, subject, of course, to such outstanding challenges to the list as may have been made to that point in the hearing. These are rules well known to the parties and articulated in the Board's jurisprudence. (See, *Gwell Investments Ltd.*, [1971] OLRB Rep. Oct. 675; *The Corporation of the Township of Kingston*, [1975] OLRB Rep. Apr. 370; *Inter City Food Services Inc.*, [1976] OLRB Rep. July 388; *Greater Windsor Investments Ltd. Windsor Nursing Home*, [1976] OLRB Rep. Sept. 515). Without these general rules certification hearings would be endless meanderings without map or compass, each turn in the journey being dictated by changing perceptions of the parties as to what best serves their own interests. That is why, absent extraordinary circumstances, the Board does not entertain submissions on the structure of bargaining unit or the list of employees in the unit after the point in the hearing when the count has been given.

9. In this case no circumstances were advanced that would persuade the Board to depart from the general rule. The list of employees first provided to the Board by the respondent was in fact filed on the very day of the hearing. There is no suggestion of the changing situation over an extended period of time. Moreover, even if there were, it would be incumbent on the respondent to amend the lists at the outset of the hearing, when it has the fullest opportunity to do so.

10. Nor is there any apparent reason to allow the union to reopen the issue of the composition of the bargaining unit to advance its new-found position that office and clerical employees, previously agreed in and indeed included in the union's original proposal for the unit, should now be excluded.

11. For the foregoing reasons the Board did not depart from its established practice and denied both the request of the union to revise the bargaining unit and the request of the employer to revise the list of employees.

12. The Board is satisfied on the basis of all the evidence before it that more than fifty-five per cent of the employees of the respondent in the bargaining unit at the time the application was made, were members of the applicant on November 6, 1981, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

13. A certificate will issue to the applicant.

0742-81-JD International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Local 128, Complainant, v. **Sheafer-Townsend Construction Limited** and United Association of Journeymen & Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 67, Respondents

Jurisdictional Dispute – Boilermakers and Plumbers unions claiming work – Agreeing to share work equally – Boilermakers subsequently refusing to do any work – Boilermakers' application claiming all the work – Whether Board entertaining complaint

BEFORE: D. E. Franks, Vice-Chairman, and Board Members J. Wilson and H. Kobryn.

APPEARANCES: *David McKee and Matthew Bakker for the complainant; D. L. Brisbin and R. G. McDade for Sheafer-Townsend Construction Limited; Stanley Simpson and Trevor Byrne for United Association of Journeymen & Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 67.*

DECISION OF THE BOARD; November 12, 1981

1. This is a complaint under section 91 of the *Labour Relations Act* concerning the assignment of certain work made by the complainant trade union. The respondents have raised certain objections to the making of the complaint and the matter was listed for a hearing on these preliminary points.

2. The disputed work concerns the insertion and removal of "blanks" in certain standpipes on a coke oven at the Stelco Hilton Works in Hamilton. The blanks in question are

plates of steel inserted at flange points on the standpipe in order to cut off or stop the fumes from an existing process.

3. The work in question was part of an extensive re-building during a shut-down of the coke ovens at Stelco. The respondent, Sheaffer-Townsend Construction Limited (hereinafter referred to as Sheaffer-Townsend) was awarded the contract by Stelco earlier this year. In consequence of this contract being awarded, the respondent, Sheaffer-Townsend, held a mark-up meeting on February 17, 1981, at which the assignments for various phases of the work was discussed and settled by the employer. It appears that the work in question was not part of the original contract between Stelco and Sheaffer-Townsend although it was probably apparent that such blanks would have to be inserted at a certain point. In any event, a contract change order was issued from Stelco to Sheaffer-Townsend on May 28, 1981, which reads in part as follows:

“To perform the following:

- supply labour, tools and supervision to prepare for and install
73 pusher side blanks and by-products side service pipe
blanks”

Since this work was not covered at the pre-job mark-up the respondent, Sheaffer-Townsend discussed the matter with the complainant, International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Local 128 (hereinafter referred to as the Boilermakers), and the respondent, United Association of Journeymen & Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 67 (hereinafter referred to as the UA). Both trade unions claimed the work in question, and the respondent, Sheaffer-Townsend decided to assign the work to both trade unions on a fifty-fifty basis. That is, the work was not to be done by a composite crew but crews of boilermakers and crews of pipefitters would each perform the blanking operation on alternative standpipes. The evidence is clear that the Boilermakers were not happy with such an assignment but were prepared to go along.

4. The work in question was to take place on Friday, June 12th. The work was to start sometime in the morning; as the coke in the coke ovens cured and was taken out of the ovens, the blanks would be inserted. Once the process started it was to be completed within 24 hours as all the coke ovens were shut down. Since Stelco was not sure what time the coke ovens would be emptied, it appears that arrangements were made for one crew to start work at 8:00 a.m. on the Friday and work through to 8:00 p.m. at which point they would be replaced by another crew which would work through from 8:00 p.m. to 8:00 a.m. by which time the process of blanking would be completed. Arrangements had to be made for the second shift of employees, and the evidence of Mr. Harry Kostyshyn who was the field supervisor on this project for the respondent, Sheaffer-Townsend, was that both unions were contacted about supplying a second shift. Some of the employees currently on the job were assigned to work on the evening shift and additional employees from both the trade unions were asked to report in at 7:00 a.m. on Friday morning to be prepared so that the Sheaffer-Townsend crew could start blanking at any time after 8:00 a.m. as required by Stelco.

5. As noted above, the complainant, Boilermakers, were not happy with the proposed split assignment and it appears that representatives of the Boilermakers met with Mr. McDade

of Sheafer-Townsend on Monday prior to the Friday on which the work was scheduled. There appears to have been some confusion about this meeting. Mr. Bakker and Mr. Tingley of the Boilermakers appeared at Mr. McDade's office in the morning. It appears that Mr. McDade was not in, however, the meeting was held that Monday afternoon. At that meeting, Mr. Bakker reaffirmed his position that the work was the work of the Boilermakers and should be assigned to them.

6. On the Tuesday of the week in question, Sheafer-Townsend was contacted by Stelco which indicated that certain blanks were to be installed before Friday as certain furnaces were being closed down before Friday since they were leaking. As a consequence of this, on Wednesday, Mr. Kostyshyn assigned crews of boilermakers to insert six blanks on furnaces which were being closed before the scheduled time. This in turn led to an accusation by the representative of the UA, Mr. Trevor Byrne, that Sheafer-Townsend had changed its assignment from the proposed fifty-fifty assignment. As a consequence, Mr. McDade called a meeting of the Boilermakers representatives, Mr. Bakker and Mr. Tingley, and the UA representatives, Mr. Byrne and Mr. Kerrigan on Thursday afternoon. At that meeting, it appears that Mr. McDade made it clear that the company intended to carry on with the fifty-fifty assignment and that the six blanks which had been installed, had been installed as a matter of convenience by the Boilermakers and further that under the proposed fifty-fifty rule the next six blanks would be assigned to members of the UA. At this meeting, it appears that Mr. McDade also raised with the representatives of the Boilermakers the matter that the men on the job site apparently had not been informed by the union as to the arrangements made concerning the assignment for the blanking. After the meeting, Mr. Bakker and Mr. Tingley went to the Stelco site where they talked with the Boilermakers working for Sheafer-Townsend on the coke oven, and it appears that the men on the site were extremely unhappy with this assignment. As pointed out by Mr. Bakker in his evidence the work in question was hot and dirty work. However, it was in effect a substantial overtime bonus for the men on the job site. Mr. Bakker's evidence as to his instructions to the men on the site was not clear. It appears that he informed the men that this was the assignment "made by the company".

7. Also on that Thursday afternoon, after the meeting, Mr. McDade got a call from Stelco. Stelco was concerned with the scheduling of the shut-down and asked McDade whether he anticipated any problems with the blanking which was to start on Friday morning. Mr. McDade was also advised that if there were problems that Stelco had another contractor, Jadco, ready to perform the work in question. On the morning of Friday the 12th, Sheafer-Townsend was advised by Stelco that the blanking would start some time shortly after 10:00 a.m. and they were advised to be ready to commence the blanking by 10:00 a.m. At about 10:00 a.m. it became apparent to Mr. Kostyshyn that Sheafer-Townsend was going to have trouble on the job. The first indication came when the general foreman of the Boilermakers contacted him to the effect that the Boilermakers were missing certain tools. These Kostyshyn proceeded to obtain from elsewhere on the site. It then appears that at about 11:00 a.m. Kostyshyn was informed by the job steward for the Boilermakers that the Boilermakers had gone home. From this point on, both Kostyshyn and McDade, tried to contact the representatives of the Boilermakers. They both found that Mr. Tingley was unavailable, although his evidence is that he was in the office that morning. Mr. Bakker refused to answer McDade's calls, however, McDade eventually got through to Bakker in Bakker's office. That conversation was interesting and its contents are not in dispute. McDade informed Bakker that the Boilermakers had walked off the job at Stelco, and that therefore they could be fired. Bakker's reaction was a flippant reaction accusing McDade of simply trying to ruin his

weekend. Bakker also indicated to McDade that the men probably wouldn't have walked off the job if "Sheafer-Townsend had not changed the assignment".

8. In view of the foregoing, Sheafer-Townsend called in extra members of the UA to perform the work in question. Mr. Kostyshyn finally got through to Mr. Tingley and informed him that since the Boilermakers had walked off the job there was no need for them to report for the second shift. Sheafer-Townsend completed the job using crews of UA members and the work force finished by 5:00 a.m. or 6:00 a.m. on Saturday morning.

9. One other point should be mentioned. When the blanks were eventually removed several weeks later, the Boilermakers continued to refuse to deal with the blanks in question and in fact Sheafer-Townsend wound up assigning the removal of the blanks to members of the UA.

10. In the circumstances, counsel for the respondents takes the position that the Board ought not to proceed with the present complaint by the Boilermakers. Both counsel took the position that in a sense the Boilermakers had "abandoned" the claim for the work. Both counsel were quick to point out, however, that there appears to be no previous Board case in this area.

11. Counsel for the complainant takes the position that the walking off of the job was the work of individual tradesmen albeit to protect the jurisdiction of their union, but was not an act of the union as such.

12. We are of the view that this is a case where the Board should decline to hear the complaint under section 91 of the Act. The gist of the complaint is that the complainant should have been assigned one hundred per cent of the work. The assignment was made on a fifty-fifty basis. (In this regard we do not find that there has been a change in the assignment as alleged by the complainant). The Boilermakers disputed the assignment on a fifty-fifty basis and claimed that they were entitled to one hundred per cent of the work. However, the clear fact remains that once the assignment was to start the Boilermakers refused to perform any of the work including the fifty per cent which had been assigned to them. We are clearly of the view that they cannot now come to the Board having refused to do any of the work and claim that they are entitled to do all of the work. As noted above, the Boilermakers, both the members and the union may have been unhappy about the fifty-fifty assignment, however, that does not entitle them to withdraw their labour and refuse to comply with the fifty-fifty assignment. Simply put, it does not now lie in their mouth to say we want the work which we refused to do.

13. For the foregoing reasons we are of the view that the present complaint should be dismissed. That being the case it is not necessary to deal with the representations of the respondent UA, as to whether or not the Board should proceed with the present application or defer to the proceedings which were commenced before the Impartial Jurisdictional Disputes Board by the Boilermakers.

1279-81-U Milk and Bread Drivers, Dairy Employees, Caterers and Allied Employees, Local Union No. 647, Complainant, v. **Silverwood Dairies Limited**, Division of Silverwood Industries Limited (London Operation) and Office & Professional Employees International Union, Local 473, Respondents.

Jurisdictional Dispute – Practice and Procedure – Unfair Labour Practice – Employee's position in complainant union's unit for long time – Position transferred to respondent union's unit – Whether complaint in fact jurisdictional dispute – Board applying criteria to determine jurisdictional dispute

BEFORE: N. B. Satterfield, Vice-Chairman and Board Members W. H. Wightman and D. B. Archer.

APPEARANCES: *Douglas J. Wray and Frank Buck for the complainant; Gordon Weir and Norman Hobbs for Silverwood Dairies Limited, Division of Silverwood Industries Limited (London Operation); Janice Best and Marcia Burns for Office & Professional Employees International Union, Local 473.*

DECISION OF THE BOARD; November 27, 1981

1. This is a complaint under section 89 of the *Labour Relations Act* alleging that the grievor, Patricia Rank, has been dealt with by the respondent Silverwood Dairies Limited, Division of Silverwood Industries Limited (London Operation) ("the employer") contrary to the provisions of sections 3, 64, 66 and 67(1) of the Act and by the respondent Office & Profession Employees International Union, Local 473 ("Local 473") contrary to the provisions of 67(2) of the Act. The event giving rise to the complaint was the issuing of a letter by the employer dated September 8, 1981 and addressed to Rank. By means of that letter the employer advised Rank that her job functions were going to be transferred into the bargaining unit for which Local 473 was the bargaining agent and that she would have the choice of remaining in that job and becoming a member of Local 473 or using her seniority in the complainant's bargaining unit to transfer into another position. The complainant is seeking by way of relief, inter alia, a declaration that both respondents have violated the Act, a direction that they cease violating the Act and a direction that Rank and her job remain in the complainant's bargaining unit.

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3. The employer contended in its reply that the dispute was not properly the subject matter for a complaint under section 89 of the Act, requested that the Board apply section 91(18) of the Act instead and proceed in the following manner:

- (a) Make examination and inquiry of the duties and responsibilities of the position of "inventory control clerk" or "records clerk";
- (b) review the collective agreements between the parties;
- (c) make a declaration and determination with respect to the descrip-

tion of the bargaining units and the appropriate jurisdiction over the subject position of records clerk.

Section 91(18) of the Act states as follows:

Where an employer is a party to or is bound by two or more collective agreements and it appears that the description of the bargaining unit in one of such agreements conflicts with the description of the bargaining unit in the other or another of such agreements, the Board may, upon the application of the employer or any of the trade unions concerned, alter the description of the bargaining units in any such agreement as it considers proper, and the agreement or agreements shall be deemed to have been altered accordingly.

4. Local 473 supported the employer's request to apply section 91(18) to the dispute and the complainant, while opposed to the complaint being dealt with pursuant to that section, was prepared to deal further with the question of whether the dispute should be determined pursuant to section 91(18) during argument on the merits of the case. In the course of hearing the representations of the parties, all three parties agreed that deferral to arbitration was not appropriate in the circumstances of the complaint. The majority of the Board, Board Member Wightman dissenting, ruled that the Board would not defer to arbitration and would proceed pursuant to section 89 to hear the evidence and argument of the parties on the substance of the complaint and, in the course of hearing their arguments on the substance, the Board would also hear their further argument on whether section 91(18) should be applied to the complaint.

5. There is little dispute as to the facts in this case. The employer operates two branches in the London area, one on Bathurst Street in the City of London and the other on Highway 401. The complainant and Local 473 each have a bargaining unit comprised of employees at both locations. Rank, who has been an employee of the employer for some 23 years in the complainant's bargaining unit, has held the job of records clerk at the Bathurst Street branch since 1975 when she was the successful applicant pursuant to the posting provisions of the collective agreement between the complainant and the employer. She was trained in her job by her supervisors. Prior to her appointment she was a production employee in the dairy department. As well, for the six months immediately preceding her appointment, she had been replacing the employee who preceded her in the records clerk job and had replaced her on one or two other occasions. Rank has been paid pursuant to the complainant's agreement ever since her appointment to the records clerk job. It is listed in the complainant's current agreement under the category "General II" of the job classifications in Wage Appendix "B". The current weekly rate shown for the job is \$293.93. The evidence indicates that the job has existed in the complainant's bargaining unit since the late 1950's when its collective bargaining relationship with the employer began. Rank is only the third to have held the job. She prepares and maintains records and reports with respect to the production and inventory of raw milk and certain of its by-products; supplies, such as cartons; and machine efficiencies. Her job has not changed since she was appointed in 1975.

6. Another employee, Janet Andrews, prepares and maintains records and reports similar in nature to those prepared by Rank but which deal with finished products inventories, shipments therefrom and manpower efficiencies. The Board has no evidence as to how long she has held the job or whether she was appointed to it pursuant to the job posting provisions

of Local 473's agreement. It is not in dispute, however, that this job is in Local 473's bargaining unit and according to Rank has been in existence since approximately 1974. Local 473 acquired its bargaining rights in 1973. It carries the job title records clerk and that job title was listed as a level 2 classification in Schedule "D", Classifications and Rates of Pay in the collective agreement between Local 473 and the employer which preceded the current one. The current agreement came into effect in July 1981 and in that agreement the job title is listed as inventory clerk, a level 2 classification and shows a current weekly rate of \$240.95. The employer has referred to both jobs by the job title inventory clerk since shortly after Rank was appointed to job. The change in the current collective agreement to Andrews' job title from records clerk to inventory clerk was made to be consistent with the employer's nomenclature. Rank and Andrews share an office at the front of the building in which the production facilities are located at the Bathurst Street branch. The main office is also at the front of that building but on the opposite side of it and the office shared by the two clerks is separated from the main office by the entrance foyer to the building. While this is the third office which Rank has occupied, she has always shared it with the person doing the job now held by Andrews. Both jobs report to the same supervisor, the plant co-ordinator. There is virtually no interchange of work and if Rank is absent from her job, a member of the complainant's bargaining unit replaces her and this is the practice which existed with her predecessor in the job.

7. The employer had concluded negotiations with the complainant and Local 473 some two to three months prior to this complaint being filed with the Board. Neither set of negotiations addressed the question of transferring the records clerk job from the complainant's bargaining unit to that of Local 473, but rather dealt only with the issue of the wage rate for each job. Around the time that the negotiations in respect of the office unit were concluded but before a memorandum of settlement had been signed, the employer received a request in writing from the president of Local 473 that Rank's job be transferred to the office bargaining unit. The request was made in the form of a memorandum dated June 19, 1981 the text of which is as follows:

I am making a request that the position in Inventory Control held by a teamster member should be taken out of teamster contract & set up as an office position under Local 473 Opeiu.

The employer responded by notifying Rank and the complainant of this request, advised them that, in the employer's view, the job should be in the office bargaining unit and notified Rank that she was to be transferred to that unit. This resulted in a grievance being filed and the employer retracted its notice to Rank. That was not the end of the matter, however, because the employer addressed another memorandum to Rank dated September 8, 1981 advising her that, effective September 21, 1981, the job functions which she performs were to be transferred to the office bargaining unit. The letter further advised her that she would have the choice of transferring with the job and becoming a member of Local 473 or remaining in the complainant's bargaining unit and exercising her seniority to transfer into another appropriate position in that unit. This action triggered a new grievance from the complainant and two days later led to this complaint being filed. Local 473, having learned that notice of the complaint would be forthcoming, filed its own grievance seeking that "The Inventory Control Position held by a Teamster member ... be transferred to OPEIU 473 a permanent [sic] position (full-time)".

8. The employer's collective agreements with the complainant and Local 473 describe their respective bargaining units in the following terms:

(a) *Complainant's bargaining unit*

"... all Employees of the Company Employed in or about its Bathurst Street and Highway 401 branches in the City of London, who come within the bargaining unit, ...". The exclusions from that unit are comprised of "office staff" and certain other categories not here relevant.

(b) *Local 473's bargaining unit*

"... all of [the employer's] Office and Clerical employees who are employed at its London and London 401 District Offices in the City of London ...". There are specified exclusions from this unit which are not here relevant.

9. While this complaint has been filed under section 89 of the Act, as a result of the Board's ruling on the preliminary issues raised by the parties, it has heard argument from the parties as to whether subsection 18 of section 91 of the Act should be applied to the complaint. The employer contends and Local 473 agrees that subsection 18 is a separate charging section of the Act and does not require that the conditions precedent which are set out in subsection 1 of section 91 be met in order for subsection 18 to be applied. Complainant counsel, on the other hand, takes the position that, even if subsection 18 is a separate charging section, it should not be applied because the descriptions of the respective bargaining units are not in conflict. These arguments notwithstanding, the Board is of the view that the complaint is in fact a complaint which satisfies all of the prerequisites of subsection 1 of section 91 which states as follows:

The Board may inquire into a complaint that a trade union or council of trade unions, or an officer, official or agent of a trade union or council of trade unions, was or is requiring an employer or an employers' organization to assign particular work to persons in a particular trade union or in a particular trade, craft or class rather than to persons in another union or in another trade, craft or class, or that an employer was or is assigning work to persons in a particular trade union rather than to persons in another trade union, and it shall direct what action, if any, the employer, the employers' organization, the trade union or the council of trade unions or any officer, official or agent of any of them or any person shall do or refrain from doing with respect to the assignment of work.

10. The president of Local 473 has made a request of the employer stated in terms of transferring a position out of the complainant's agreement into that of Local 473. The employer has attempted in the first instance to comply with this request by transferring both the work and the employee to whom it is presently assigned into the jurisdiction of Local 473. When this failed, the employer attempted next to transfer the work to the jurisdiction of Local 473 to be done by one of its members. There is no doubt on the evidence that the work would be assigned to Rank if she were to accept the transfer to the office bargaining unit. When the niceties and technicalities of the parties' positions are stripped away, what the Board has before it is in reality a complaint filed by the complainant which was triggered by a demand from the president of Local 473 that work, which had heretofore been assigned to a member of the complainant be in future assigned to a member of Local 473. Therefore the conditions precedent for a complaint under section 91 have been met. Furthermore, all parties to the

dispute were present at the hearing into the complaint and had full opportunity to call evidence and make their representations to the Board on that evidence and on the provisions of the Act which should be applied by the Board in determining this matter.

11. The Court in Ontario has said that the Board has the power under section 106 of the Act to apply any section of the Act in order to grant relief to parties in situations where the Board is of the opinion that they should have relief. See *Genaire Ltd. v. International Association of machinists and the Ontario Labour Relations Board*, (1958), 14 D.L.R. (2d) 201, 58 CLLC ¶15,388 (Ont. H.C.), Aff'd. (1959), 18 D.L.R. (2d) 588, 59 CLLC ¶15,416 (Ont. C.A.). The circumstances of this case are such that it could be determined under either of sections 89 or 91. The parties have had the opportunity to argue as to the applicability of these sections, as noted above and, indeed, counsel for the complainant argued as to how the Board should apply its usual jurisdictional disputes resolution criteria were it to decide the complaint pursuant to section 91 of the Act. Therefore there is no risk of a denial of natural justice were the Board to decide the case pursuant to section 91 instead of section 89. Since the complaint contains all the elements of a jurisdictional dispute; since all of the parties to the dispute were parties to the proceedings and since section 91 of the Act provides a satisfactory means of resolving the matters at issue, the Board is of the view that the complaint should be determined pursuant to section 91. The Board will decide the complaint, therefore, as though it had been made under section 91 in the first instance.

12. When the Board inquires into a complaint under section 91, before deciding what action, if any, it shall direct any of the affected parties to take or refrain from taking with respect to the assignment of work, the Board considers a variety of criteria. These include the nature of the work; the skill and training involved; the employer's past practice; area past practice; employer preference; safety, efficiency and economy; collective bargaining relationships and the jurisdiction of the competing unions based on their constitutions or defined in collective agreements with employers. Several of these criteria are of minimal assistance to the Board in this case because most of the evidence and argument dealt with the collective bargaining relationships between the employer, the complainant and Local 473 as they appear to flow from the collective agreement each union has with the employer and with the representation rights of the complainant and Local 473. It is useful nonetheless to deal separately with that evidence which does relate to each of these criteria.

The Nature of the Work

13. The nature of the work involved with both jobs is, for all material purposes, the same. They differ only in that Rank's job deals with raw milk and machine efficiencies and Andrews' job deals with finished products and labour efficiencies. The information with which they work comes from the production operations and the records and reports which they prepare are used primarily for the control of those operations. While this favours keeping them associated with the production facilities, it does not favour either union.

Skill and Training

14. The skills required are basic clerical skills and the evidence in respect of Rank's job indicates that the training is provided by the supervisors and is entirely on-the-job training. This favours neither union when the jobs are filled by hiring.

15. Both collective agreements require that job vacancies be posted and that the employer first give consideration to employees in the bargaining unit in filling the vacancy before considering candidates from outside of the respective bargaining units. Rank's job is the only one in the classification schedule of the complainant's collective agreement which bears a job title of an obvious clerical nature. While it is entirely possible that other jobs in the schedule have a clerical content, there is no evidence of this being the fact. On the other hand, Local 473's bargaining unit is a unit of office and clerical employees and this is reflected in all of the job titles in the classification schedule of its collective agreement. Therefore it is reasonable to conclude that there would be a greater store of compatible skills to draw from in filling the Records Clerk job by posting if it were in the office and clerical bargaining unit. This favours slightly Local 473.

Employer's Past Practice

16. The past practice of the employer has been to assign the work presently being performed by Rank to an employee in the applicant's bargaining unit since the applicant's bargaining rights for the unit were first established. Rank replaced her predecessor in the job whenever she was absent and did so for the six months prior to Rank's own appointment. Rank, in turn, is replaced by one of two employees in the complainant's bargaining unit when she is absent from the job. Moreover, this practice has continued during the approximately seven years that the parallel job, now filled by Andrews, has existed in Local 473's unit. Finally, Rank was appointed to the job pursuant to the job posting provisions of the complainant's collective agreement. This factor clearly and substantially favours the complainant.

Employer's Preference

17. The employer's clear preference is to have the work performed by an employee in Local 473's bargaining unit. This is indicated by the evidence of its several efforts to have the work and/or the incumbent performing the work transferred to the office and clerical unit. This favours Local 473.

Safety, Efficiency and Economy

18. There is no direct evidence about safety, but the job is performed primarily in an office setting and it would continue to be performed in that setting if the job was performed by an employee in the office and clerical unit. It is reasonable to infer that there would be no difference in the safety element of the job. This favours neither union.

19. The fact that the rate of pay is lower in Local 473's agreement would, at least for the duration of its collective agreement, allow the employer to realize wage savings. But the Board has held that this factor of itself does not provide a criterion for settling a jurisdictional dispute on the basis that no trade union can claim jurisdiction merely because it is prepared to do the work at a lower rate of pay than another trade union. See *Anchor Shoring Limited*, [1974] OLRB Rep. Aug. 528.

20. Were the work assigned to the office and clerical unit there may be some potential for future economies because of the apparently greater opportunity to rationalize work tasks where there are more jobs of a primarily clerical matter, but there is no evidence that the

employer has any plans for such rationalization. It is reasonable to infer, however, that some economies or efficiencies might be realized from the greater availability of compatible skills in the office and clerical unit when there is need to find a temporary or regular replacement for the incumbent in the job. This slightly favours Local 473.

Collective Bargaining Relationships and Jurisdiction of the Collective Agreements

21. Neither agreement contains a work jurisdiction clause claiming for it the work in dispute. The definition of Local 473's bargaining rights in the scope clause of its collective agreement and the exclusion of "office staff" from the bargaining unit in the scope clause of the complainant's agreement this appear to give Local jurisdiction over the work. The uncontradicted evidence is, however, that the employee who has performed the records clerk job has been represented in collective bargaining by the complainant since the commencement of its bargaining relationship with the employer. This was the situation when Local 473 obtained its bargaining rights in 1973, when Andrews' job was created and was still the case when this complaint was made. The job title records clerk in the applicant's current collective agreement was being applied to the disputed work when this dispute arose and from all of the evidence as to the history of the job being filled by a member of the applicant's bargaining unit, it is reasonable to conclude that the prior collective agreements made provisions in the classification schedule for this work. This leads to the inescapable conclusion that, notwithstanding the wording of the scope clause, the complainant's bargaining unit has always included the work in question. The incumbent, Rank, has been an employee in the complainant's bargaining unit for 23 years, during 17 years of which she has seen persons in her present job being represented by the complainant and for the past 6 years has herself been represented in the job by the complainant. This is clearly a case of long-standing employees having chosen to be and presently being represented by the complainant in this work. This consideration clearly favours the complainant.

22. The Board is of the view that, having regard to the foregoing criteria and for the following reasons, the employer's past practice and the collective bargaining relationship are the criteria which finally resolve the dispute. The strongest criterion in favour of assignment to Local 473 is the employer's preference and it gains some slight, additional support from the criteria skill and training and safety, efficiency and economy. The employer's past practice, on the other hand, has been so entrenched over such a long period of time that, in the absence of cogent evidence of a reasonable and substantial need to change its assignment, this factor by itself outweighs the influence of the aforementioned criteria. Therefore, when the two criteria, employer past practice and the collective bargaining relationship, are combined, they weigh heavily in favour of the disputed work continuing to be assigned to the complainant.

23. Accordingly, the Board directs that the employer continue to assign the work of records clerk as it is being performed by Patricia Rank in its London Operation to employees in the bargaining unit represented by Milk and Bread Drivers, Dairy Employees, Caterers and Allied Employees, Local Union No. 647.

24. In view of the foregoing decision, it is unnecessary for the Board to exercise its discretion pursuant to either sub-sections 15 or 18 of section 91 to amend the description of either bargaining unit.

0001-81-R United Steelworkers of America, Applicant, v. Stanley Precision, Inc., Respondent, v. Group of Employees, Objectors

Employee – Whether foremen exercising managerial functions – Whether employee evaluation and disciplinary functions resulting in their exclusion

BEFORE: R. D. Howe, Vice-Chairman, and Board Members J. D. Bell and B. L. Armstrong.

APPEARANCES: *Brian Shell, Hugh MacKenzie, Harry Hynd and Jim Marlow for the applicant; J. P. Wearing and R. Gratton for the respondent; no one appearing for the objectors.*

DECISION OF R. D. HOWE, VICE-CHAIRMAN, AND BOARD MEMBER J. D. BELL;
November 23, 1981

1. This is an application for certification in which the applicant seeks to represent the following unit of employees:

All employees of the respondent in the City of Hamilton who are designated "foremen" save and except persons who exercise managerial function, office and sales staff and persons covered by a collective agreement between Local Union 4444, the United Steelworkers of America and the respondent herein designed on May 9, 1979.

2. By decision dated May 11, 1981 in this matter, the Board, differently constituted, appointed a Board Officer to inquire into and report to the Board on the duties and responsibilities of the sixteen persons (listed in that decision) classified by the respondent as "foremen". During the four days of examinations, six of the foremen were examined on the agreement of the parties on the basis that a decision would be made as to whether or not further witnesses would be called after examination of the six had been completed. Upon completion of the examinations of those six foremen, the Board Officer ruled that sufficient evidence was deemed to have been heard unless either party indicated that evidence new or significantly different would be heard from other foremen on the list. Neither party requested examination of other foremen on the list. However, the respondent called General Foreman Ronald Gratton as a witness having knowledge of the duties and responsibilities of the foremen in question. (As a general foreman to whom a number of the foremen affected by this application report, Mr. Gratton is not included in the bargaining unit set forth above.)

3. After receiving the Board Officer's Report, each of the parties submitted written representations to the Board and also made oral submissions to the Board at a hearing held for that purpose at the request of the applicant. At that hearing, counsel for the applicant conceded that Stanley Furlanetto, one of the six foremen examined, exercises managerial functions within the meaning of section 1(3)(b) of the Act and should, accordingly, be excluded from the bargaining unit. However, counsel for the applicant contended that the other foremen are not within the purview of section 1(3)(b). Counsel for the respondent, on the other hand, submitted that the application should be dismissed since all of the foremen exercise managerial functions within the meaning of section 1(3)(b), which provides, in part, as follows:

“Subject to section 90, for the purposes of this Act, no person shall be deemed to be an employee,

...

- (b) who, in the opinion of the Board, exercises managerial functions or is employed in a confidential capacity in matters relating to labour relations.”

4. In *Hydro Electric Commission of The Borough of Etobicoke*, [1981] OLRB Rep. Jan. 38, the Board was called upon to determine whether certain foremen who worked for the respondent Commission exercised managerial functions. (The bargaining unit applied for in that case was a “tag end unit of approximately thirteen foremen”.) In that decision, the Board summarized the pertinent jurisprudence under section 1(3)(b) as follows:

“20. In making determinations under section 1(3)(b) of the Act the Board has continually recognized that effective collective bargaining necessitates an arms length relationship between employees on the one hand and management on the other. In acknowledgement of a fundamental divergence between the objectives, priorities and interests of the two groups, the managerial exclusion in section 1(3)(b) functions to exclude from the scope of ‘employee’ those persons who, because of the exercise of managerial functions and allegiance to management, would be placed in a position of conflicting interests if allowed to engage in collective bargaining.

21. The term ‘managerial functions’ is not defined by the Act. The Board, therefore, must assess the facts of each case to determine whether the duties and responsibilities in question have true managerial significance. In *Cottage Hospital (Uxbridge)*, [1980] OLRB Rep. March 304, the Board at pp. 305-306 summarized the approach it takes to evaluating whether an individual exercises managerial functions:

Over the years the Board has developed general guidelines to assist it in evaluating whether an individual exercises managerial functions (see *Inglis Limited*, [1976] OLRB Rep. June 270, *Chrysler Canada Limited*, [1976] OLRB Rep. Aug. 396 and *McIntyre Porcupine Mines Limited*, [1975] OLRB Apr. 261). For those persons whose work has little or no impact on the employment relationship, the Board looks to whether or not they exercise independent decision-making responsibilities in matters of policy or the running of the organization. The Act does not operate to exclude those who only make effective recommendations in this regard. Nor does it exclude persons whose independent decisions are either circumscribed within pre-determined limits set by others or limited to technical and procedural determinations flowing from their expertise in a limited field. (See *Libby, McNeil and Libby of Canada*, [1976] OLRB Rep. May 193, *Inglis Limited*, *supra*; and *Dominion Stores Limited*, [1976] OLRB Rep. Aug. 44 and *Canadian General Electric*, [1979] OLRB Rep. Jan. 12).

Different considerations apply to the work of a second group of persons who may be characterized as having a direct effect on the employment relationship or the terms and conditions of employment of those in the employ of the organization. Supervisors of employees or those technical experts whose work affects terms and conditions of employment or hiring and employment policies would fall within this group. In determining whether such persons whose work has a direct effect on the employment relationship exercise managerial functions, the Board assesses whether or not they exercise effective control and authority over employees either in direct contact with the employees or through their decisions. In making this evaluation, the Board looks to whether the person has, at a minimum, the authority to make effective recommendations relating to conditions of employment. An effective recommendation is a 'serious recommendation that the evidence demonstrates is usually acted upon, and therefore a recommendation that materially affects the economic lives of employees'. (*McIntyre Porcupine Mines Limited, supra*, at 289).

22. Concerning the evaluation of foremen in particular, the Board made the following comment in *Peterborough Civic Hospital*, [1973] OLRB Rep. Mar. 154 at pp. 155-156:

We have long recognized that in the early stages of industrial organization the foreman was a key person in the management hierarchy. Persons looking for a job came to the foreman, who had the right to hire, to fire, to grant raises and to assign work. The foreman was effectively 'the king of the shop' insofar as the employees were concerned. He had a great deal of discretion and he was able to make decisions which greatly affected the welfare of the employees. Moreover, he exercised considerable control over their day to day work life. The evolving position of the foreman in industry is more fully described in the *Spruce Falls Power and Paper Co. Limited* case 47 CLLC ¶16,489, and it is not necessary for us to describe that situation any further.

However, a very important and significant factor in arriving at decisions about whether foremen were managerial was the conflict of interest theory which recognized that foremen owed a duty to management to control and discipline employees, and if the foreman was placed in the bargaining unit so as to become a union member, it would seriously impair his management function. As such, the duty to be owed to management would be incompatible with the trade union interests that he held in common with his fellow employees; cf. *Ferranti Packard Electric Limited*, [1968] OLRB Rep. Sept. 572.

The evolution of industrial organization and the advent of collective

bargaining altered the position of the foreman in many situations. He is no longer the 'king of the shop'; hiring and firing are done by the personnel department; the work may be controlled by the terms of a collective agreement or where there is no collective agreement the work may be controlled in a similar fashion. The result of the many changes in the hierarchical structure has diminished the foreman's responsibility to the point where he may be left with the vestiges of power that he once exercised and where he previously stood visibly with management he now stands on the periphery between being a member of management and being an employee.

23. In *McIntyre Porcupine Mines Limited, supra*, the Board at pp. 278-279 noted the existence of some 'rules of thumb' for foremen. In the industrial context, for example, foremen are generally excluded from bargaining units. In the construction industry a distinction is regularly drawn between working and non-working foremen, with working foremen regularly falling within the bargaining unit and non-working foremen falling outside. These 'rules of thumb' merely reflect common practice and are not hard and fast rules. They do not themselves determine whether any particular foreman or group of foremen are employees for the purposes of the Act. Whenever a question arises over the appropriateness of the application of the 'rule of thumb' in a particular case, the question must always be whether the foremen in question in fact exercise managerial functions within the meaning of section 1(3)(b) of the Act.

...

25. Exercising supervisory functions does not by itself exclude a person from engaging in collective bargaining. Even when a person is primarily engaged in the supervision of others he is not managerial unless he also has effective control over their employment relationship. (See *Falconbridge Nickle Mines Limited*, [1976] OLRB Rep. Sept. 379 and *McIntyre Porcupine Mines, supra*.) Scheduling work for employees and co-ordinating their efforts (something regularly done by the foremen in this case) is not itself a managerial function. (See, in addition to the cases previously cited, *Second Manufacturing*, [1975] OLRB Rep. Sept. 658; *Thames Steel Construction Limited*, [1979] OLRB Rep. May 440 and *Caledon Hydro-Electric Commission*, [1979] OLRB Rep. Oct. 924.)

26. To determine whether the foremen in this case exercise managerial functions within the meaning of section 1(3)(b) of the Act, the Board will look to whether or not they exercise effective control and authority over the people they supervise as may be seen by an ability, at a minimum, to make effective recommendations in areas that materially affect the economic lives of the employees. If they act merely as conduits for management and do not themselves effectively control the economic lives of their employees, they would not be exercising functions with true managerial significance. As well, foremen would not be exercising

managerial functions if they merely gather facts relating to their men from which management is then able to make its own decisions as to how to deal with particular situations. Even if foremen's evaluations of employees are given serious consideration and are relied on by their supervisors in making their decisions affecting employees, the foremen would not be making effective recommendations unless the recommendations are so consistently and frequently followed that it could be said that through the recommendations the foremen are effectively controlling or determining the decisions. A recommendation would not be effective, for example, if it was merely one of several factors considered or relied on by a supervisor in the course of making his own independent decision. Similarly, foremen would not be viewed by the Board as exercising managerial functions if they merely act within strict supervisory guidelines set by others.

27. Areas of fundamental importance to the economic lives of employees and thus areas that would assist the Board in deciding whether a foreman has effective control and authority over people he supervises would include, among others, the foreman's participation in the hiring, discharging and disciplining of employees, his input into their general performance evaluation, participation in the grievance procedure and, to a lesser extent, the foreman's ability to give time off and assign overtime...."

(See also *Weldo Plastics Limited*, Board File No. 1545-80-R, decision dated May 19, 1981, unreported; *Corporation of the Township of West Lincoln*, [1981] OLRB Rep. Apr. 436; *The Chatham Hydro Electric System*, [1979] OLRB Rep. Sept. 857; *City of Timmins*, [1979] OLRB Rep. May 373; and *Chrysler Canada Limited*, [1976] OLRB Rep. Aug. 396.)

5. The report indicates that the extent of the authority exercised by the foremen in question — that is, the foremen who were examined other than Mr. Furlanetto (hereinafter referred to as the "foremen") — varies somewhat from individual to individual. However, we are of the view that those variations are relatively minor and more likely reflect personality differences among the individuals in question than actual differences in duties and responsibilities.

6. The respondent is in the business of rolling, annealing and slitting of carbon steels. Each of its foremen supervises between nine and twenty-five employees in the various departments of the respondent's operations. Each foreman reports to one of the three general foremen. The other positions in the respondent's managerial hierarchy are Plant Manager and President. The foremen generally have very little involvement with hiring, although the evidence indicates that at least one of them has effectively recommended the hiring of a particular individual. However, once persons have been hired, the foremen under whose supervision they work orient them, ensure that they are properly trained and prepare weekly written evaluation reports through which the foremen can effectively recommend termination of their employment during their probationary period.

7. The foremen also play a significant role in disciplining employees. Under the respondent's "Responsible Discipline" process, a foreman initially "consults" an employee

with respect to misconduct, performance deficiencies or other problems. If that performance counselling does not correct the problem, the foreman then gives the employee a "verbal reminder", which is somewhat analogous to an oral warning. A further infraction will generally result in the issuance by the foreman of a "written reminder" to the employee, which is akin to a written warning. Foremen have the power to take each of those steps on their own authority, although some of them do occasionally consult with a general foreman before delivering a written reminder. The foremen also have the authority to suspend an employee for the balance of his shift if he engages in serious misconduct such as reporting for work in an inebriated state. However, as in the *Etobicoke* case, *supra*, the decision as to whether the employee will be paid for the balance of the shift is made by someone other than the foreman who suspended the employee. Thus, the disciplinary impact of such "suspensions" is not determined by the foremen but rather by their superiors. Nevertheless, as stated by counsel for the respondent, a foreman's decision to send an employee home for the balance of his shift can have a substantial impact on production regardless of whether or not the employee ultimately receives remuneration for the period of "suspension". Moreover, it may be inferred that the foreman's report with respect to the events which gave rise to the "suspension" will generally be a significant factor in the determination of the disciplinary action (if any) that is ultimately taken as a result of such an incident. Thus, it is clear from the evidence as a whole that the foremen do play a significant role in the respondent's disciplinary process.

8. Under the collective agreement in force between the applicant's Local 4444 and the respondent in respect of the approximately 175 workers whom the foremen supervise, the foremen are responsible for replying in writing to individual grievances at the first step of the grievance procedure. Although foremen sometimes consult with their respective general foremen concerning the precise language to be used in replying to a particular grievance, it is clear from the evidence that the foremen have authority to, and do in fact often reply to step one grievances without consulting with their superiors. Of equal if not greater importance to the effective administration of the collective agreement is the role of the foremen in discussing employee complaints with individual employees before a formal grievance has been launched, in an effort to resolve potential grievances before they are reduced to writing. This early involvement in potential grievances frequently results in the denial by the foremen of grievances which are ultimately filed with them. This is not surprising in that such a grievance would generally be resolved by a foreman prior to the formal filing if the foreman were of the view that the grievance had merit. However, this does not detract from the fact that, as in *Chrysler Canada Limited*, *supra*, the foremen have authority to settle some grievances, including those involving simple monetary claims and improper distribution of overtime, and have the responsibility and authority to provide a written response on behalf of management at the first step of the grievance procedure.

9. The foremen also have authority to sign employee time cards so as to authorize payment for time worked by employees which for one reason or another is not otherwise reflected on the time cards. Some of the foremen grant casual time off to employees although the evidence indicates that such requests are generally referred to the general foremen. There is no evidence that foremen perform work similar to that performed by persons whom they supervise, except in emergency situations and in relation to checking product quality. Unlike their workers, each foreman receives a salary which is adjusted annually on the basis of his individual performance. Foremen have the power to stop production if they detect deficiencies in product quality. They are also responsible for reassigning employees to other tasks in the event of an equipment breakdown. When one or more of his employees are absent, a foreman

calls in one or more off-duty employees to replace the missing employees by working overtime, or arranges for employees to be shifted from another department to fill the void. Each foreman has keys for his office, the main gate of the plant, the time office, the first aid room, the water shut-off for the sprinkler system and the store room which contains "a minimum of half a million dollars in stock"; the employees supervised by the foremen do not have any such keys.

10. Foremen attend foremen's meetings at which matters including personnel, production, Company policies, grievances and the administration of the collective agreement are discussed, and at which some decisions are made. Some of the foremen have also attended supervisory courses outside of the plant at the expense of the respondent concerning "functions of supervisory management". One of the prevailing themes that runs through much of the evidence contained in the report is that of the overall responsibility of the foremen to maintain productivity and quality, and to ensure the "smooth running" of their respective departments and shifts.

11. Viewed as a whole, the evidence clearly indicates that many of the duties and responsibilities of the foremen have true managerial significance. Although the foremen in question may not be "Kings of the shop", having regard to all of the evidence and the submissions of the parties, and having particular regard to the foremen's assessment of probationary employees, participation in the disciplinary process and participation in the grievance procedure, the Board is of the opinion that the foremen exercise managerial functions within the meaning of section 1(3)(b) of the Act. Accordingly, there are no "employees" in the bargaining unit for which the applicant seeks bargaining rights.

12. For the foregoing reasons, this application is hereby dismissed.

DECISION OF BOARD MEMBERS B. L. ARMSTRONG;

1. I dissent.

2. The *Labour Relations Act* is designed to encourage collective bargaining and this Board should strive to ensure that this right is not unduly limited. Where supervisors and foremen do not materially affect the economic lives of employees under their jurisdiction they should not be denied the right to collective bargaining.

3. The Officer's Report, with the exception of the shift foreman Ron Bereza and the maintenance foreman Stanley Furlanetto, who should be designated managerial, reveals that the functions performed by the rest of the foremen are, at best supervisory, and are not managerial.

4. These supervisors have no involvement in hiring. They assist with orientation and training and complete an evaluation report on probationary employees by marking the appropriate boxes on a prepared form. They can deal with employees with respect to misconduct or job performance but must consult with a general foreman before disciplining an employee with a written warning. More severe discipline is imposed by the general foreman or other managerial employer. Request for casual time off by employees must be referred to the general foreman by these supervisors.

5. The evidence clearly indicates that the duties and responsibilities of these people

called foremen are merely conduits for management with no independent control over the people they supervise, no authority or participation in hiring, discharging or evaluating permanent employees, no power to give time off or assign vacations, no input into the work or work assignment.

6. The general foreman must be notified of all changes with respect to quality or quantity of work performed by individuals and changes if necessary in production.

7. The foremen are not managerial but are merely supervisors who carry out the instruction of management and should not be deprived of the right to participate in collective bargaining.

1267-81-M Service Employees Union, Local 268, Applicant, v. St. Joseph's General Hospital, Respondent.

Employee Reference – Question as to employee status arising after signing of new collective agreement – Board restricting officer's inquiry to changes in duties and responsibilities

BEFORE: M. G. Mitchnick, Vice-Chairman, and Board Members F. W. Murray and B. L. Armstrong.

DECISION OF THE BOARD; November 24, 1981

1. This is an application pursuant to section 106(2) of the *Labour Relations Act*, requesting the Board to determine whether certain named persons are "employees" within the meaning of the Act. The first correspondence from the applicant was received by the Board on September 8, 1981.

2. The respondent employer was sent a copy of the application by the Board on October 15, 1981, once all of the necessary information had been obtained from the applicant. The employer then replied by letter of October 28, 1981, which read in its material respects:

The persons whom the Union contends are "employees" under the Act are employed in positions which have been specifically excluded under the provisions of the Collective Agreement and have been so excluded since the first agreement.

The previous Collective Agreement expired March 31st, 1981 and the parties have on October 1, 1981 concluded a new agreement running from April 1, 1981 to May 31, 1982.

• • •

The Hospital's position in respect of the Union's Application under Section 106(2) is that Board policy set in previous cases precludes the

Union from referring such a question to the Board on the following grounds:

- (1) Where the parties have entered into a Collective Agreement without reservation of an issue relating to section 106(2), the Board treats the parties as having accepted the status quo at least for the term of that Agreement.
- (2) The Union did not reserve an issue relating to Section 106(2) and a Collective Agreement has been duly entered into as stated above on October 1, 1981.

The applicant was sent a copy of the employer's letter by the Board on November 2, 1981, but has filed no reply.

3. The Board's policy in regard to matters of this sort was discussed in *Westmount Hospital*, [1980] OLRB Rep. Oct. 1572, particularly at paragraph 4:

... Where parties have by virtue of their collective agreement or other form of agreement settled upon the employment status of a person, the Board at one time refused to let either party at any time withdraw unilaterally from that agreement by means of an application under section 95(2) of the Act. (See, for example, *Belleville General Hospital*, [1975] OLRB Rep. June 487.) The basis for this policy is that a party, having entered into an agreement on the status of a particular person, cannot, in the absence of a material change in duties and responsibilities, come before the Board and claim that a "question" exists as to the status of that person. More recently, the Board has liberalized this policy so as to permit an application to be brought during negotiations for the renewal of a collective agreement, after the collective agreement has expired. Parties therefore are no longer bound indefinitely to the terms of an initial agreement. The Board will not, however, permit an application (other than one relating to *changes* in the duties and responsibilities) to be brought during the first set of negotiations following agreement upon the status of the person in question (*Collingwood General Marine Hospital*, [1975] OLRB Rep. Jan. 18). Nor will it permit a full application to be brought during the term of a collective agreement, unless it is satisfied either that the position is a new one arising during the term of the collective agreement, or that the applicant prior to entering into the collective agreement expressly reserved its right to bring a subsequent section 95(2) application on the person in dispute. Otherwise the applicant will be taken to have acquiesced in the position of the other party, and to have accepted it at least for the term of that collective agreement. The Board upon receipt of an application under section 95(2) during the term of a collective agreement therefore automatically limits the appointment of a Board Officer to inquiring into *changes* in the duties and responsibilities since the date the agreement was entered into (e.g. *Ontario Hydro*, [1975] OLRB Rep. July 560).

4. There is nothing in the material before the Board to suggest that the applicant placed the respondent on notice prior to entering into the new collective agreement that it was reserving its right to dispute the status of certain persons before the Board, or even that the status of such persons was an issue. In these circumstances, the Board has difficulty saying that a question has even "arisen" between the parties in the "course" of negotiations, as those words are used in section 106(2). While it is clear from the two parties' correspondence that a question exists *now* between the parties, that question can fairly be said to have arisen only *after* the consummation of the new collective agreement. Pursuant to its normal policy, therefore, the Board appoints an officer to inquire into and report to the Board on any material *changes* in the duties and responsibilities of the following persons since the new collective agreement was entered into on October 1, 1981:

1. Joan Cuff	Secretary & Clerk to Medical Director
2. Jeanette Langilla	Confidential Payroll Clerk
3. Lois Riddell	Secretary to Radiology
4. Jim Poulin	Storekeeper
5. Joyce Bourke	Secretary to Rehabilitation
6. Lorana Deluca	Secretary to Pathologists
7. Maire Kelly	Assistant Medical Records Librarian.

2145-80-U; 2146-80-R; 2147-80-R United Food and Commercial Workers International Union, Complainant, v. **Sunnylea Foods Limited; Maple Leaf Egg Products Ltd.; Turkstra's Eggs Ltd.; Jacob Zonneveld, Respondents.**

Discharge for Union Activity – Sale of a Business – Unfair Labour Practices – Whether sale of business or assets only – Whether union's bargaining rights following sold business to new location outside certificate area – Whether plant shut-down and sale to avoid collective bargaining – Whether purchaser part of conspiracy – Whether purchaser responsible for predecessor's unfair labour practices – Whether purchaser refused to hire employees of predecessor because of union activity – Whether employee terminated for union activity – Whether order going against principal officer personally

BEFORE: George W. Adams, Chairman and Board Members J. A. Ronson and W. F. Rutherford.

APPEARANCES: *James Hayes, Don Dayman and Michael Bowman for the applicant/complainant; David E. Ivey, Herman Turkstra, and Jack Zonneveld for Sunnylea Foods Limited and Jacob Zonneveld; and C. M. McKeown and Jules Lewy for Maple Leaf Egg Products Ltd. and Turkstra's Eggs Ltd.*

DECISION OF THE CHAIRMAN; November 24, 1981

1. These matters involve an application under section 63 of the *Labour Relations Act* and a complaint filed under section 89 alleging violations of sections 64, 66 and 70. The United

Food & Commercial Workers International Union (hereinafter referred to as "the union") brings both of these matters before us alleging that they involve the unlawful closure, sale and removal of a business to escape collective bargaining. The union was certified by the Board to represent certain employees of Sunnylea Foods Limited (hereinafter referred to as "Sunnylea") on April 30, 1980 pursuant to section 7a (now section 8) of the *Labour Relations Act*. The Board had found that Sunnylea discriminated against six employees in response to protected activity under the statute. The Board also found that threats to close the plant if the trade union was successful were made by the respondent company and that this conduct was also unlawful. The certificate issued to the complainant/applicant reads:

Upon the application of the applicant and in accordance with the provisions of *The Labour Relations Act*, THIS BOARD DOTH CERTIFY United Food and Commercial Workers International Union as the bargaining agent of all employees of Sunnylea Foods Limited in the City of Grimsby, save and except forepersons and persons above the rank of foreperson, office staff, sales staff, students employed during holiday and vacation periods and persons regularly employed for not more than 24 hours per week.

This certificate is to be read subject to the terms of the Board's decision(s) in this matter and, accordingly, the bargaining unit described herein is to be read subject to any qualifications referred to in the said decision(s) of the Board.

It is also to be noted that by decision dated June 19, 1980 the Board reinstated another employee who the Board found was discharged for her union activity. Sunnylea, until October 22, 1980 was in the egg grading business. It purchased eggs from producers; graded them by a process which included washing, candling and packing; and sold them to customers, many of whom were chain stores. Jacob Zonneveld is the owner and principal officer of Sunnylea. He also owns an egg producing farm known as Sunnybrae Farms Limited (hereinafter referred to as "Sunnybrae"). One of the unfair labour practices on which the certification was based included the discharge of a key union organizer, Mr. Robert Berton. Mr. Berton was returned to work on or about March 28, 1980 pursuant to a Board order. He was again discharged on May 9, 1980 and this action of Sunnylea is also the subject matter of the complaint before us.

2. On or about October 20, 1980 Sunnylea discontinued business. The union alleges that at about the same time a new egg grading plant performing the same work as was performed in Grimsby by Sunnylea was opened in Mississauga under the name of Maple Leaf Egg Products Ltd. (hereinafter referred to as "Maple Leaf"). At approximately the same time another egg grading business in Burlington, Ontario known as Turkstra's Eggs Ltd. (hereinafter referred to as "Turkstra's") discontinued business and the union alleges that the same work as was performed in Burlington is also being performed at the new Mississauga facility. It alleges that several key managerial personnel from both Sunnylea and Turkstra's are now operating Maple Leaf. The union further alleges that Maple Leaf is under the direction and control of Sunnylea and Turkstra's and/or their respective principals or shareholders and that there was a sale of business within the meaning of the Act from Sunnylea plant shutdown was affected in an effort to avoid or evade the collective bargaining obligation to the union and that Maple Leaf and Turkstra's in knowingly assisting this effort also violated the *Labour Relations Act*. Finally, the union alleges that on or about October 22,

1980 former Sunnylea employees Harvey Crowe, Sandra Rattle, Debbie Henson, Candy Morris, Denise Dochstader and Kathy Travis were denied employment by Maple Leaf because of their previous association with the union.

3. The union seeks the following relief:

- (a) a declaration that all respondents have violated the *Labour Relations Act*;
- (b) a cease and desist order from continued unlawful conduct;
- (c) damages to all members of the Sunnylea bargaining unit and to the union including organizing, negotiating, legal and other costs thrown away payable with interest as appropriate;
- (d) a declaration that the bargaining rights flowing from the April 1980 certificate bind Maple Leaf;
- (e) a direction that Maple Leaf offer all members of the Sunnylea bargaining unit their previous jobs or substantially equivalent jobs at the new Mississauga location of Maple Leaf;
- (f) a direction that employees who accept the offer set out in paragraph (e) above be further provided with:
 - (i) terms and conditions of employment in effect at the new location save and except that the hourly pay of these employees will be "red circled" at the previous Sunnylea rate should that be required;
 - (ii) reimbursement for all reasonable transportation, commuting, or temporary housing costs in connection with their relocation for up to one year from their commencement of work at the Mississauga location;
 - (iii) reimbursement for all reasonable moving and relocation costs incurred within two years from their commencement of work at the Mississauga location;
 - (iv) their seniority date portable from Sunnylea to exceed any new employee hired at Maple Leaf to be applicable to Maple Leaf;
- (g) a direction that the respondents compensate all members of the Sunnylea bargaining unit, who do not elect relief pursuant to paragraph (e) above, by way of damages for loss of employment, a sum equivalent to the amount of one year's wages and benefits;
- (h) in the alternative to paragraph (d) above, a direction that the respondents for a period of two years provide the union with:
 - (i) a list of Maple Leaf employees' names, addresses and telephone numbers, such list to be updated monthly;

- (ii) reasonable access to the Maple Leaf Mississauga plant to post union notices, bulletins, and other union literature;
- (iii) access to the Maple Leaf plant to convene two union meetings during paid working hours on reasonable notice to Maple Leaf;
- (iv) reimbursement for all reasonable costs incurred by the union in seeking to organize Maple Leaf for a period of one year from the date the union elects to undertake such activity;
- (i) a direction that:
 - (i) there the Board posting in the usual form at Maple Leaf;
 - (ii) that the decision of the Board be mailed to every member of the Sunnylea bargaining unit;
- (j) such other and additional relief as counsel may advise and the Board sees fit to grant.

4. Much of the earlier controversy between the union and Jacob Zonneveld appears to be the product of Zonneveld's religious beliefs. He is a member of the Christian Reform Church in Grimsby and believes that any union he deals with must be "Christ centered." Unfortunately, the union in this case does not qualify. He testified that to be a deacon of his church one cannot be involved in union activity of any kind. Zonneveld was a deacon prior to the presence of the trade union. It would also appear that a number of his employees share his religious convictions with respect to trade unions. Paragraphs 7 and 8 of the union's particulars allege the following:

- 7. On May 13, 1980 an article appeared in the Globe and Mail reporting the decision of the Board dated April 30, 1980 in which the credibility of Mr. Jacob Zonneveld, owner of the respondent, was questioned. There was widespread publicity in the Niagara Region that day. On the same day May 13, Mr. Berton was discharged by the respondent.
- 8. On May 13, 1980 Mr. Jacob Zonneveld was quoted in the Toronto Star as saying:

"If I spoke my mind about the hearing, I would probably be held in contempt, so I won't. All I can say is that I believe all gifts come from God. As a steward (of God) I have to make sure the gifts are used properly. If there's a union, I figure the union is living off me. Unions are sinful, violent and don't believe in God."

Zonneveld said that while he 'feels sorry' for his employees, "I've made my decisions. I've an obligation to these people, but now its up to them to make their decision. They know how I feel. I have to be able to look at myself in the mirror in the morning."

In the same article Mr. Herman Turkstra, counsel for the respondent, is quoted as saying that "No-one could force him to stay in business. He could sell, retire or close."

5. Don Dayman, business agent for the union, testified that negotiations with Sunnylea began May 15, 1980 with the company's lawyer, Mr. Ivey, representing Sunnylea. Additional meetings were held on June 20, July 4, July 16, August 1 and August 28. He testified that Mr. Ivey stated that he had been instructed to bargain in good faith; that religion was still a problem; and that Mr. Zonneveld had various options but that he (Ivey) did not know which one he was going to choose. Dayman said it was no secret that Zonneveld would consider selling his business if certified, although Dayman did not think he would go through with it. He testified that on August 27, 1980 he was notified for the first time that the plant was closing and that he learned about the existence of Maple Leaf on the same day. He agreed there was a clear split in support for the trade union within the bargaining unit which had not been "manufactured" by Zonneveld. He further testified that he dealt with the competitors of Sunnylea and that he may have discussed Sunnylea's certification proceedings with one of them.

6. Jacob Zonneveld testified that he had been in business since 1959. Between 1972 and 1974 he purchased up-to-date equipment at \$100,000 per machine with a capacity of 68 cases of 12 dozen eggs per hour. Soon after, however, more advanced equipment came onto the market requiring fewer employees and with a greatly expanded capacity of 120 to 130 cases per hour. These new machines cost \$250,000 each. The Board was advised that Sunnylea was one of the smaller of the principal egg graders in Ontario. L. H. Gray, Maplelin and Bernbrae were said to be much larger and occupy 50 percent of the Ontario market. With the minimum price of eggs from the farm being regulated by the Egg Marketing Board and with his competitors' prices setting an upper limit on what he could charge customers, Zonneveld said Sunnylea could not alter the financial climate in which it operated. He testified that he looked for financing in 1978 to permit him to acquire the new equipment but was unsuccessful. At the time he was operating in an inadequate building and his vehicles needed to be replaced as well. On the other hand, his competitors, he said have always had money to play with. It was not disputed that on the advice of his accountant and after taking all of these factors into account, he listed his business property and assets for sale on October 16, 1978. The listing agreement prohibited the agents from approaching various competitors so that he would not lose his source of egg supplies. Sunnylea had never had a long term contract with his suppliers and Zonneveld feared that they would sell to others if he appeared to be going out of business. The listing agreement was introduced into evidence and indicated a number of extensions into July of 1979. It was also his undisputed evidence that there was no sign of union interest in his company until October of 1979. During its financial year ending April 30, 1979, Sunnylea experienced a \$40,591 after tax profit on \$8,633,000 in sales; as of April 30, 1980 it experienced a \$43,300 net loss on \$11,913,000 in sales; and from May 1980 until June 31, 1981 it incurred a \$43,150 loss on \$5,122,000 in gross sales. This financial data went unchallenged by the trade union. It was also accepted that during this period his indebtedness to the Royal Bank in Grimsby was as high as \$450,000 and in mid-1980 he was asked by that bank to transfer his business elsewhere — a polite way of indicating that otherwise the loan would be called. Fortunately, in July of 1979 Zonneveld had commenced discussions with Mr. Bruce Buckingham of W. B. Cross Co. Ltd. to consider entering into a new egg grading venture that would combine greater volume with the new, efficient egg grading equipment then available. These discussions were still continuing at the time the Royal Bank requested him to remove his

business and Buckingham was instrumental in arranging for his indebtedness (which was then approximately \$300,000) to be transferred to the Canadian Imperial Bank of Commerce. Zonneveld testified that had he not met the Cross family and Buckingham he could not have survived. The financial basis to this statement was not disputed by the trade union. Indeed, Zonneveld had clearly been trying to sell his business since 1978 but without success. There was no evidence that these efforts were not serious or that his asking price was unrealistically high. Thus, we must find that Zonneveld had decided to cease operations on the right terms before the arrival of the trade union.

7. Bruce Buckingham is President of W. B. Cross Company Ltd. (hereinafter referred to as "W. B. Cross"), a company with a number of investments in food related businesses. He testified that during 1978 he had discussions with a Mr. Andrew Tuvel who was associated with Sunnylea. Various witnesses described Tuvel as a food broker and as a person with "good connections" to the food chain customers. Zonneveld described him as an employee and his assertion in this regard was not challenged by the union. Buckingham testified that Tuvel initiated these discussions with a view to determining whether W. B. Cross would be interested in investing in an egg grading business. Tuvel had been involved in another business acquired by W. B. Cross in "the early seventy's". It was apparently Tuvel's view that the unsuccessful egg grading operations were essentially too small but that there was considerable profit potential for a large consolidated business. Buckingham recalled Tuvel again "dropping by" in the spring of 1979 and in late June of that year arrangements were made for a visit to Jack Zonneveld's farm the following month. Buckingham said Tuvel expressed the belief that few of the existing egg grading businesses were sufficiently viable to supply the requirements of the chain stores. He was concerned about his welfare and the industry's according to Buckingham. The timing of his concern not unreasonably coincides with Zonneveld's decision to sell his business and again pre-dates the presence of the trade union at Sunnylea. Buckingham testified that before the spring of 1979 he had not heard of Sunnylea or Turkstra's. The July meeting at Sunnylea included William Cross, David Cross, Buckingham, Tuvel, and Sunnylea's accountant and lawyer. By October of 1979 W. B. Cross was sufficiently interested to instruct their solicitors to explore the proper corporate vehicle. At this time the concept, at Tuvel's urging, involved the participation by those involved in the existing egg processing businesses of Metzger, Whyte, Zonneveld and Turkstra's. A key meeting of all potential participants was held in Toronto in January 1980, but by February Metzger had apparently decided against participating for personal reasons and Whyte ran into financial problems. Buckingham testified that in July of 1979 no mention was made of unions or labour relations but by February 1980 he was well aware of Zonneveld's problems in this regard. At the time of the Labour Board's decision in late April, Buckingham called Zonneveld for an explanation and testified that following this conversation he was fully aware of Zonneveld's perspective. Zonneveld expressed to him a great deal of concern if the union stayed certified but did not say how the plans with Buckingham would help him. Also in February, Buckingham retained Thorne Riddell to study the possible investment and a report was presented in March of 1980 indicating the need and potential for increased volume with new equipment and plant. Buckingham said that the new venture had to be a consolidated enterprise with more sophisticated and newer equipment. He also said that when they began looking for a new site the best areas seemed to be Grimsby, Burlington, and Milton. The new venture needed a plant with at least 50,000 square feet, at a reasonable price and in the area of a good labour pool. Zonneveld testified that his property was unsuitable for expansion. He was located on top of the escarpment in Grimsby without city water and sewage. His existing operation used 20,000 gallons of water a day and the new business would require up to 50,000 gallons. Moreover, he

was unaware of any other land in Grimsby that was suitably serviced. There is no reason not to accept this testimony. Buckingham testified that he instructed real estate agents to search for suitable premises in the Grimsby, Burlington, and Milton areas but no available property in those areas was really suitable. Two real estate agents testified and denied that they were instructed to look for property away from the Grimsby area. They confirmed that many properties were looked at but none were suitable. However, in April 1980 premises in Mississauga on Tomken Road were found and judged to be suitable although apparently over the objections of Zonneveld and Henry Lammers of Turkstra's. The lease for these premises was filed with the Board and dated May 7, 1980. Maple Leaf was incorporated April 30, 1980 as the corporate vehicle to commence operations at this new location. All of the foregoing evidence is in marked contrast to the site selection criteria relied upon by Westinghouse and the lack of immediacy of the impugned move in that case. See *Westinghouse Canada Limited*, [1980] OLRB Rep. April 577.

8. Maple Leaf, controlled by W. B. Cross but clearly involving Turkstra's, went into possession at the new premises with new machines in September of 1980. However, Zonneveld had "second thoughts" and decided against participating. It was his evidence that he had been an independent businessman too long and could not convince himself to enter into a business venture with others. Buckingham, on the other hand, was extremely concerned about getting both a supply of eggs from Sunnybrae and Zonneveld's co-operation in making contact with the other egg producers of Sunnylea. At apparently the time Zonneveld decided against equity participation, Tuvel decided to become involved in the ownership of Maple Leaf. Whether Tuvel's participation was related to Zonneveld's decision to not participate we do not know, although this appears to be the case. Eventually, the participation became \$1,200,000 (15,000 shares) for W. B. Cross; \$400,000 (5000 shares) for Henry Lammers of Turkstra's; and \$100,000 (1250 shares) for Andy Tuvel to be held by Rexim International Trading Limited. Tuvel did not participate to the degree that it was expected Zonneveld would. Buckingham testified that Maple Leaf was so interested in acquiring Sunnybrae's supply of eggs through Zonneveld and Zonneveld's co-operation, it was decided to buy the assets of Sunnylea and tie this purchase to obtaining its supply of eggs. A number of documents were filed with the Board documenting this commercial transaction. The first was a document dated December 16, 1980 addressed to Sunnylea over the signature of the President of Maple Leaf, Bruce Buckingham. Paragraph one stipulates that Maple Leaf is to purchase the assets of Sunnylea set out in Schedule A to the document for the price therein. The assets included an assortment of small tools and supplies (\$2,854); wire baskets (\$104,367.44); farm carts (\$98,000); plastic tray drier (\$3,400); refrigeration (\$22,200); and other miscellaneous equipment (\$37,753.40); for a grand total of approximately \$268,000. This amount was to be paid directly to Sunnylea's bank account and used by the bank to reduce Zonneveld's indebtedness. It was agreed that the purchaser was not purchasing "the business of the vendor as a going concern, but . . . only purchasing certain assets of the vendor." By paragraph three Sunnylea was to deliver a statutory declaration that the vendor has no unsecured creditors other than the Canadian Egg Market Agency and the indemnity of Jacob Zonneveld and Sunnybrae from any claims of creditors made against the assets, the indemnity secured by a mortgage on the egg farm owned by Sunnybrae. By paragraph 5 the vendor warranted that it did not have any employees as of the date of closing. The date of closing was set for December 31, 1980 and the guarantors, Zonneveld and Sunnybrae, agreed to enter into the following agreements. Exhibit 4 is an agreement between Maple Leaf and Jacob Zonneveld (described as vendor) which is expressly in consideration of Maple Leaf purchasing the assets owned by Sunnylea and in consideration of \$2.00. Essentially, it consists of the following two covenants:

1. The Vendor covenants and agrees that for a period of five (5) years from the date hereof he will not (except as required by an agreement made as of December 31, 1980 between the Purchaser, the Vendor, Sunnylea and SunnyBrae Farms Limited) either individually or in partnership or in conjunction with any other person or persons, firm, association, syndicate, company or corporation as principal, agent or shareholder or any manner whatsoever, carry on or be engaged in or connected with or interested in, advise, loan money to, guarantee the debts and obligations of or permit his name or any part thereof to be used or employed by any other person or persons, firm, association, syndicate, company or corporation engage in or concerned with or interested in within Ontario, any business similar or identical to the business of grading eggs, carried on by Sunnylea as at August 1, 1980.

2. At any time during the five year period referred to above SunnyBrae Farms Limited may, on three months notice to the Purchaser commence to grade, at SunnyBrae Farms Limited, the eggs produced on that farm, provided that such eggs are then sold to the Purchaser in a graded fashion and further provided that SunnyBrae Farms will not give such notice to you until all four of the Purchaser's present four grading machines are operating at full capacity, and if within 1 year the Purchaser has purchased a fifth machine, then until all five of the Purchasers grading machines are operating at full capacity. Exhibit 5 is an agreement dated December 31, 1980 between Maple Leaf, Jacob Zonneveld, Sunnylea and SunnyBrae. Sunnylea is described as the "vendor". It too is in consideration of Maple Leaf having purchased Sunnylea's assets (and in consideration of \$2.00) and commits Zonneveld and Sunnybrae to offer to supply to Maple Leaf all the eggs produced by Sunnybrae. Zonneveld (and Sunnybrae) further agreed to "use his best efforts to continue the supply of eggs to Maple Leaf from suppliers listed in Schedule 1." The suppliers listed were Sunnybrae, B.N.R. Poultry Farms Ltd., W. Currie, J. Oosterhof and I. Piasecki.

9. Buckingham testified that the purchase price for the assets was extremely generous and clearly designed to obtain Zonneveld's supply of eggs and his co-operation in having former egg suppliers of Sunnylea become suppliers of Maple Leaf. He wanted to "keep Zonneveld happy" was the way it was put and guarantee Sunnylea's supply of eggs. Buckingham also acknowledged that Sunnylea's trucks and trailers were used by Maple Leaf for six months until Maple Leaf acquired its own vehicles through McClive Leasing. Indeed, Zonneveld received a better price for his vehicles by having them traded in with McClive on Maple Leaf acquiring new equipment from that company. Zonneveld worked as a consultant to Maple Leaf in November 1980 and, according to Buckingham, provided valuable advice about the operation of the new business. Buckingham also admitted that Maple Leaf hired a number of key management and operating people formerly employed by Sunnylea but denied that it was part of the asset purchase. These people included a cost accountant (Bob Van Kam), Jacob Zonneveld's brother who was involved in the trucking side of Sunnylea's business, a key maintenance man, two or three truck drivers who knew the routes and, of course, Tuvel. Van Kam was hired on the recommendation of Thorne Riddell. Buckingham said that Zonneveld helped Maple Leaf obtain egg supplies from Sunnylea's former suppliers

but he thought the “key” here was paying for two weeks supply in advance. This was said to be a unique concept in the industry. The evidence disclosed that Henry Lammers of Turkstra’s is in charge of the day-to-day operation of the Maple Leaf business. Buckingham testified that Andy Tuvel “had the chain store accounts not Sunnylea” and that his involvement was instrumental in Maple Leaf obtaining the former customers of Sunnylea. Buckingham testified that Maple Leaf now employs sixty to seventy persons whereas Sunnylea employed approximately forty and Lammers indicated that the business has “a little over” the combined volumes of Sunnylea and Turkstra’s businesses. Buckingham admitted that he was well aware of Zonneveld’s labour relations difficulties from February 1980 onward. The Board’s decision certifying the trade union was dated April 30, 1980 and Buckingham executed the offer to lease on May 6, 1980. Buckingham was also aware that Andy Tuvel attended many of the Labour Board certification hearings dealing with Sunnylea. Buckingham testified that Zonneveld never confided to him precisely why he was closing his plant. Buckingham admitted that the supply of eggs is critical to an egg grading business and can be the difference between success and failure. It is clear to the Board that the closing of Sunnylea (and Turkstra’s) and the opening of Maple Leaf were closely co-ordinated so that customers and suppliers experienced a smooth transition. Notice of closing was given by Zonneveld in late August; Maple Leaf commenced operations in September; and by October all suppliers and customers were looking to Maple Leaf. Buckingham emphasized that one of the unique features of Maple Leaf is its close proximity to its customers whereas its competitors are close to the producers. Just how this unique feature results in an economic advantage was not explained to the Board but Buckingham was not cross-examined on the statement.

10. Since 1975 Henry Lammers had been the sole owner of Turkstra’s located in Burlington, Ontario. Turkstra’s employed thirty-five to forty employees. He testified that in 1978 Zonneveld indicated to him that he wanted to get out of the egg grading business and asked him if he was interested in acquiring Sunnylea. Tuvel was apparently instrumental in bringing the two men together and Turkstra was interested in Tuvel continuing on in his capacity as food broker if Sunnylea was acquired. These discussions eventually came to involve W. B. Cross. Again, it is important to point out that Turkstra’s involvement pre-dated the presence of the trade union at Sunnylea. Lammers testified that he advised his staff in Burlington that he was closing and gave them the required notice on September 2, 1980. He said that he offered employment to former employees of Turkstra’s who lived in Burlington or north-east of Burlington but not to people “who lived too far away.” He admitted that he was present at Maple Leaf on October 22, 1980 when former Sunnylea employees, Harvey Crowe, Sandra Rattle, Debbie Benson, Candy Morris, Denise Dochstrader and Kathy Travis attended the premises and applied for work. He believed that other persons also sought employment on that day. He agreed that Andy Tuvel came into his office at the same time and advised him that the former Sunnylea employees had been witnesses or were present at the earlier Labour Board hearings. Lammers testified that he gathered they were “pro union”. Because they had driven all the way from Vineland, he paid them the courtesy of speaking with Harvey Crowe. He told Crowe the distance was too great for these people to commute on a daily basis and that, in any event, he was not hiring. The Board was advised that the Maple Leaf plant is approximately an hour and a quarter drive from the Grimsby area and that no public transportation connects the two locations. Lammers testified that he didn’t feel experience was necessary in an egg processing plant and that he had told several former Sunnylea employees who called him that the commuting distance was too great. Hiring refusals were said to include a Ms. Vandervelde who was described by Jack Zonneveld as “an excellent quality control girl” and who apparently was against the union. However, Maple

Leaf did hire some people from the Grimsby area including Gerry Blokker, Frank Dykstra, Frank and Rick Zwaagstra's were drivers and, according to Lammers, their earning were sufficient to support the required commuting. Moreover, their routes included the area in which they lived. The financial rationale also applied to Leen Zonneveld who was in charge of shipping. Lammers denied that he was aware of when Sunnylea would close or that the closings of Turkstra's and Sunnylea were co-ordinated. On the facts, this statement cannot be accepted. He also denied that the closings included the transfer of staff. All of Maple Leaf's hirings were on an individual basis he said. Lammers denied that Maple Leaf received routing maps from Sunnylea and stated that Maple Leaf's routes were planned with the assistance of the drivers.

11. Lammers denied that Maple Leaf purchased any of Sunnylea's suppliers. Lammers stated that suppliers are seldom under contract and are "free agents". He pointed out at least nine former producers or suppliers who do not supply Maple Leaf anymore. Lammers was extensively cross-examined on lists of producers and customers for Sunnylea, Turkstra's and Maple Leaf. At the conclusion of this testimony it was clear that the vast majority of former producers and customers of Sunnylea and Turkstra's are now the producers and customers of Maple Leaf. In addition, the drivers of Maple Leaf, a number of whom were Sunnylea drivers, follow the same routes used by Sunnylea. Lammers said that the continuation of customers and producers was only possible through a lot of hard work by Maple Leaf staff. Both he and Mr. Von Zeidenberg, a former Sunnylea employee, approached producers; offered them the two week pre-payment program; and sought their support. He made no mention of the efforts by Zonneveld and Buckingham. Cross-examination also revealed that a significant number of the senior operational staff (approximately 50%) are or were former Sunnylea employees. Mr. Beamer, a helper on the trucks, was also revealed as another exception to the commuting distance hiring policy.

12. Lammers admitted recalling some newspaper articles in the summer about the possibility of Zonneveld closing his plant. Lammers agreed there was a lot of discussion in the Niagara Peninsula area about Zonneveld's problems with the trade union and that he became aware in January of 1980 that Zonneveld was thinking about closing his plant. Indeed, as their discussions about forming a new business progressed, the closing of Zonneveld's business in Grimsby became obvious. Lammers said he was aware at a very early point that a union was trying to organize Sunnylea and Tuvel made him aware of the Labour Board proceedings. Lammers denied that Zonneveld told him what he was going to do about his trade union problems but he admitted Zonneveld said he was anxious to join the new venture because of his religious problems with the union. Lammers could not recall being told by Zonneveld that he was prepared to close his plant because of his religious beliefs. Lammers testified that in refusing to hire former Sunnylea employees he was only concerned about the commuting distance and the problem of labour turnover. On the other hand, he admitted that a number of his senior staff are making this trip each day, although, insisted it was more economical for them. Surprisingly, he then stated that he was not hiring that day and that had they come back he probably would have hired them. But they never returned and Lammers made no effort to contact them even though they had each filled out applications for employment. He agreed it crossed his mind whether the people he was hiring were sympathetic to the union but that such thoughts did not enter into his hiring decisions. He agreed that store deliveries to Sunnylea's former customers began by Maple Leaf immediately after Sunnylea closed and that Tuvel made all the arrangements.

13. Zonneveld testified that Robert Berton was reinstated by the Labour Board on March 13, 1980. Berton had injured his arm and, accordingly, when he returned to work Zonneveld decided it was inappropriate to return him to his position as driver. He was therefore put in the cooler where eggs graded and packed. This required the continual lifting of twenty-five pound packages of eggs onto pallets — approximately the same weight he had to lift as a driver. Zonneveld testified that other employees complained that Berton was not “pulling his weight” although no employee was called to support this assertion. It is also quite clear that the job in the cooler involved much more lifting than did Berton’s job as a truck driver. Zonneveld testified that he believed one needed two arms to drive a 30 ton truck safely down the escarpment. Berton was dismissed on May 13, 1980 but returned to his job as driver on June 26, 1980 as the result of a “without prejudice” settlement with the union. According to Zonneveld, he received a number of complaints from customers about Berton’s rudeness and the employee was alleged to have damaged his truck. These allegations were not substantiated and Berton apparently quit his employment on September 22, 1980. Zonneveld denied that Berton’s dismissal on May 13, 1980 had anything to do with his union activity although Zonneveld believed that Berton brought the trade union into the plant and disliked him immensely for this action.

14. The interrelationship between the closing of Sunnylea and Zonneveld’s admitted hostility to the union is a key issue in this case. We reviewed above Zonneveld’s economic predicament and the way in which Buckingham assisted him in his problem with the Royal Bank. Zonneveld also testified that the trade union’s presence forced him to consider his alternatives. He could close-up or look for an amalgamation. He said he spoke about his convictions to Leen Zonneveld and Hennie Vandervelde and, when it was clear the union was coming in, indicated that he had no choice but to “sell, quit or close-up.” His brother apparently repeated this to the employees in the plant. He admitted that he spoke to a Toronto Star reporter in early May of 1980 but denied using the precise expressions found in that report. He said that with the union he found “absolutely no joy in working anymore.” However, he had decided to close his business and approached his relations with the union as a “grin and bear it one.” He knew the plant would be closed in a few months and said the union had nothing to do with the plant closing — “the decision to close was really made in 1978.” Zonneveld said he stayed open for two weeks beyond what was legally required so employees could find jobs and paid them an extra week’s wages. He also advised employees to seek employment with Metzger and with Turkstra’s new business. He denied that certain employees who were against the union were retained for an extra week. Rather, he asked for volunteers to help with the plant clean up that week and no one came forward. He was therefore obligated to select employees by seniority and their proximity to the plant. He could not see how this “hard work” was a reward of any kind. He denied closing his plant to avoid collective bargaining. He said if his company had been profitable he “would have fought the union for twelve months until the employees were no longer interested which [was his] right as a Canadian citizen. And if that didn’t work [he] would have sold the business.” On cross-examination he admitted that Sunnylea agreed to stay open until Maple Leaf was prepared to handle the product. He said that his customers had been cultivated over his many years in the business and Tuvel handled the problems with the chain stores and was paid a certain amount for their patronage and any expanding business. There was no cross-examination of Tuvel’s precise role in the Sunnylea business. The only producers Sunnylea had under contract or control were Sunnybrae, B.N.R. Poultry Farms, W. Currie and V. Oosterhof named in Schedule A to the December 16, 1980 agreement. However, Zonneveld also asked Niagara Grain “to keep the eggs coming” and he went to all of his producers with Buckingham;

explained the pre-payment program; and asked them to sell to the new company. He played a role in advising Maple Leaf on the purchase of new equipment. He described Boy Van Kam as "his right-hand man" and said that only Joe Polo knew the machinery. Van Seidenberg, a member of the Christian Reform Church, was also described as a key employee. He testified that he asked for the right to grade eggs on his farm only to make the farm more valuable. He thought it was impossible for him to get back into business. He said that it was not possible to tell the union of his plan to close his plant because its representatives might have told his competitors as they had discussed the events surrounding the certification proceedings. His competitors would then have approached his producers and this "would have broken" him. He said the only reason he was able to continue for a few months after his bank asked him to change his business was because of the assurances given by Buckingham to the Canadian Imperial Bank of Commerce and the fact that Maple Leaf was not ready to take over yet. At the last minute he decided against joining Maple Leaf because "emotionally [he] could not accept [he] was no longer calling the shots."

15. Zonneveld said he would have told Lammers about the union "the minute those problems surfaced." He testified that he is sure he told Lammers and Buckingham what he felt and thought. He was sure he discussed the situation with them in December 1979 and January 1980 and that he told them what he would do if he had to sign a collective agreement. He said he felt so strongly about it he could not see how he would have left it out. He said they also discussed whether his union problems would create problems for Maple Leaf but he testified that "Buckingham is not the kind of guy to worry about a problem that is not there." Zonneveld said he told Buckingham and Lammers that if the union got in at Maple Leaf he would have to leave and Buckingham replied that "we will solve that problem when it surfaces in the plant." He said Lammers and Tuvel "took their lead from Buckingham." As for Berton, Zonneveld said he second-guessed Berton's doctor and concluded he could not drive safely. He admitted that he never questioned Berton about the use of his arm or asked to speak to his doctor.

Argument

16. On behalf of Maple Leaf it was submitted that Sunnylea had only sold some of its assets to Maple Leaf. Counsel submitted that the Board should make a distinction between the egg grading business of Sunnylea and the egg farm owned by Sunnybrae. Maple Leaf bought the assets of Sunnylea to ensure a supply of eggs from Sunnybrae. The business of Sunnylea was in a losing position and, it was submitted, that the restrictive covenant obtained by Maple Leaf was just "icing on the cake." The purchaser would have closed the deal without it. Counsel pointed out that the former employees of Sunnylea now working for Maple Leaf were not employed by Sunnylea at the executive level. Counsel also emphasized that Sunnylea was "living on borrowed time" as a further indication that Maple Leaf only bought its assets. Alternatively, it was submitted that a successor employer cannot be "visited with the sins" of the predecessor employer unless the successor was involved in a scheme to circumvent the Act. Counsel reviewed the evidence in detail and submitted that there was not a scintilla of evidence suggesting Maple Leaf was part of such a scheme. It was pointed out that Jacob Zonneveld was not involved in Maple Leaf in any way; he was not part of the executive group; the customers were said to be those of Andrew Tuvel; there was no plan to locate away from Grimsby; and business discussions had commenced as early as 1978. Counsel reviewed Maple Leaf's hiring decisions asserting that all had a bona fides business purpose. He submitted that Maple Leaf's decision to locate in Mississauga was free of anti-union animus and that, even if a

sale had taken place, the bargaining rights of the complainant did not extend to the new location. Counsel emphasized that if Maple Leaf violated the Act in failing to hire former Sunnylea employees who applied for work, this isolated violation could not be justification for bestowing bargaining rights on the trade union.

17. On behalf of Jacob Zonneveld and Sunnylea, counsel challenged the union's delay in bringing these matters on and asserted that his clients had been prejudiced. Counsel submitted that it would have been irresponsible to put Berton on the road. He contended that Sunnylea was "dead" before it closed and that the presence of the union was essentially irrelevant to the demise of Sunnylea. Counsel warned that the Labour Board is not in the business of punishing people for what they believe and that much of what Zonneveld testified to were matters of belief not action. It was submitted that a person had a right to cease doing business and that Sunnylea could not be forced to stay in business. Counsel contended that the Act was violated only when protected activity was the proximate cause of an employer's action and such was not established in the instant matter. It was also contended that Jacob Zonneveld always acted in his capacity as an officer of Sunnylea and should not be named as a respondent in his personal capacity.

18. On behalf of the union it was submitted that : (a) Maple Leaf is the successor to Sunnylea; (b) the closing and sale of Sunnylea was the subject of an unlawful motive; (c) Maple Leaf purchased Sunnylea in the full knowledge of Zonneveld's unlawful motive and was therefore a proper respondent to a remedial order; (d) alternatively, Maple Leaf is responsible for remedying the breach of the Act in any event. In asserting that the sale of a business had occurred, counsel pointed out that Maple Leaf had the same producers and customers as Sunnylea; serviced each by the same routes with the same drivers; and Maple Leaf was operated by a significant number of Sunnylea's senior employees. Counsel emphasized that Zonneveld was paid a great deal of money for assets that Maple Leaf did not really need; that Zonneveld provided important know-how to Maple Leaf; that Zonneveld played a key role in transferring Sunnylea's supply of eggs to Maple Leaf; and that, by virtue of his agreement with Maple Leaf, Zonneveld was prohibited from going back into business for a period of time. Counsel contended that it was simply too technical to draw distinctions between Sunnylea, Sunnybrae and Andrew Tuvel's relationship with Sunnylea's customers. It was submitted that Sunnylea's unlawful motivation could be deduced from its earlier actions documented before this Board; from its subsequent treatment of Berton; from the evidence of Zonneveld before this panel and his earlier statements that he would close his business; from Sunnylea's conduct in bargaining; and from the timing of Sunnylea's actions. Counsel submitted that Maple Leaf was fully familiar with Jacob Zonneveld's labour problems and had to appreciate that the sale and closing of his business was intended to thwart collective bargaining. It was submitted that in the light of this knowledge Maple Leaf became party to an unlawful act and was properly the target of a remedial order. It was also submitted that, in any event, a successor employer was properly obligated to remedy the statutory violation of a successor employer. In this latter respect the Board was referred to *Golden State Bottling Co. Inc.* (1973) CCH, ¶14,124 (USSC); *Uncle Ben's*, [1979] 2 Can. LRBR 126; and *Victoria Flying Services*, [1979] 3 Can. LRBR 216.

Decision

19. Counsel for the union, at the outset of his argument, withdrew his application under section 1(4) of the *Labour Relations Act* for a declaration that Sunnylea, Turkstra's and

Maple Leaf constitute one employer for the purposes of the *Labour Relations Act* and that the certificate granted to the union on April 30, 1980 binds all three companies. Thus, as noted in paragraph 1, we have before us an application pursuant to section 63 for a declaration that Maple Leaf is a successor employer to Sunnylea and a declaration that the bargaining rights flowing from the April 1980 certificate bind Maple Leaf. We also have before us a complaint filed under section 89 of the Act alleging violations of section 64, 66 and 70. The complaint attacks the closing of Sunnylea and the opening of Maple Leaf as an unfair labour practice designed to evade the bargaining rights of the trade union and substantial relief against all four respondents is requested. The refusal by Maple Leaf to hire certain former Sunnylea employees is also in issue.

20. Beginning with the section 63 issue first, the relevant section is section 63(3) which provides:

63(3) Where an employer on behalf of whose employees a trade union or council of trade unions, as the case may be, has been certified as bargaining agent or has given or is entitled to give notice under section 14 or 53, sells his business, the trade union, or council of trade unions continues, until the Board otherwise declares, to be the bargaining agent for the employees of the person to whom the business was sold in the like bargaining unit in that business, and the trade union or council of trade unions is entitled to give to the person to whom the business was sold a written notice of its desire to bargain with a view to making a collective agreement or the renewal, with or without modifications, of the agreement then in operation and such notice has the same effect as a notice under section 14 or 53, as the case requires.

The matters for determination under this section are (1) whether Sunnylea sold its business to Maple Leaf; and, if so, (2) whether any employees remain in "the like bargaining unit in that business" for the trade union to represent. In *Raymond Côté*, [1968] OLRB Rep. Mar. 1211 the Board commented:

"The meaning to be attached to the word 'business' depends to a great extent on the facts and circumstances in each particular case. It cannot be said that any one facet of an enterprise taken by itself necessarily comprises a business. It has been expressed that a business is 'the totality of the undertaking.' The physical assets of buildings, tools and equipment used in a business are not necessarily the undertaking per se but are, along with management and operating personnel and their skills, necessary in the operations to fulfill the obligations undertaken with a hope of producing profit to assume its success. The total of these things along with certain intangibles such as goodwill constitute a business."

21. It was contended that Maple Leaf only brought the assets of Sunnylea and that section 63 therefore had no application. Indeed, the document of December 1980 at paragraph 2 specifically states this to be the case. But this document, by paragraphs 7 and 8, is conditional on Jacob Zonneveld executing other agreements and on Sunnylea and Sunnybrae agreeing to enter into other agreements. This Board is concerned with the substance of a transaction as

opposed to its form. See *Metropolitan Parking Inc.*, [1979] OLRB Rep. Dec. 1193 at 1205. As noted by Widjery, J., in *Kenmir v. Frizzell et al*, [1968] 1 All E.R. 414 at p. 418:

“In deciding whether a transaction amounted to the transfer of a business regard must be had to its substance rather than its form, and consideration must be given to the whole of the circumstances, weighing the factors which point in one direction against those which point in another. *In the end, the vital consideration is whether the effect of the transaction was to put the transferee in possession of a going concern, the activities of which he would carry on without interruption.* Many factors may be relevant to this decision though few will be conclusive in themselves. Thus, if the new employer carries on business in the same manner as before, this will point to the existence of a transfer, but the converse is not necessarily true, because a transfer may be complete even though the transferee does not choose to avail himself of all the rights which he acquires thereunder. Similarly, an express assignment of goodwill is strong evidence of a transfer of the business, but the absence of such an assignment is not conclusive if the transferee has effectively deprived himself of the power to compete. *The absence of an assignment of premises, stock-in-trade or outstanding contracts will likewise not be conclusive, if the particular circumstances of the transferee nevertheless enable him to carry on substantially the same business as before.*”

[Emphasis added]

There is the evidence of Bruce Buckingham that Sunnylea's assets were purchased to obtain Sunnybrae's supply of eggs and Zonneveld's co-operation in continuing the supply of eggs from Sunnylea's other producers. According to Buckingham, Lammers and Zonneveld, the supply of eggs is the central most important feature of an egg grading business and Zonneveld had built up Sunnylea's supply over twenty years in business. To a very real extent, the supply of eggs is an egg grading business and its goodwill is the capacity of the business to maintain this supply on transfer. The evidence reveals that Zonneveld played a key role in effecting an almost total transfer of egg supply from Sunnylea to Maple Leaf. The other documents signed by Zonneveld on behalf of Sunnylea and Sunnybrae tend to confirm the transfer of a business. These two documents dated December 31, 1980 are both tied into the so-called asset transfer and, in our view, the three documents introduced into evidence document a single transaction. Zonneveld and Sunnylea promised to “use [their] best efforts to continue the supply of eggs” from key suppliers and that Sunnybrae will supply eggs to Maple Leaf and transfer that obligation to any purchaser. We are satisfied that a transfer of egg supply in this industry, particularly where this is explicitly tied to the purchase of assets, is a key indicator of a sale of a business within the meaning of the *Labour Relations Act*. In our view, a clear indication of transactional intent is also revealed by the restrictive covenant precluding Zonneveld and Sunnylea from going back into business for a fixed period of time. Having bought what it understood to be Zonneveld's business, Maple Leaf was not about to let him immediately return to the industry and let his goodwill take its toll. On these facts alone we would have found the sale of a business.

22. These facts, of course, do not stand alone. There is the additional evidence that Zonneveld transferred significant managerial know-how in a document prepared in November 1980. According to Bruce Buckingham he gave important managerial advice to

Maple Leaf. Sunnylea's closing was clearly co-ordinated with the opening of Maple Leaf to effect an orderly transfer of business from Sunnylea to Maple Leaf. Also of significance is the almost total transfer of customers from Sunnylea to Maple Leaf. It was submitted that the customers were those of Andrew Tuvel. However, Mr. Tuvel was not called as a witness before this Board to expose himself to questioning about his relationship with Sunnylea. Had he so testified it may well have been our view that both he and Jacob Zonneveld controlled Sunnylea in fact although the union never took this position before us or argued the case on this basis. In any event, without direct testimony from him we are unwilling to give him a status separate from Sunnylea. The trade union accepted that Tuvel was only a key employee of Sunnylea and relied on the transfer of customers as another indication of the transfer of Sunnylea's business. We also have the direct testimony of Jacob Zonneveld that he considered the customers to be his customers and that efficient service to them was vitally important. Not only were all of Sunnylea's customers maintained but so were the route schedules linking producers and customers to Sunnylea. In the peculiar circumstances of this case and in this industry, we are unwilling to view the emergence of Maple Leaf as simply the product of a number of independent commercial and hiring transactions. It is our opinion and finding that Maple Leaf represents an amalgamation of the Sunnylea and Turkstra's businesses. The co-operation of Jacob Zonneveld and Sunnylea were vital to the establishment of Maple Leaf and such co-operation, coupled with a restrictive covenant, far outweighed the importance of buying the physical assets that were purchased. We therefore find that Sunnylea sold its business to Maple Leaf within the meaning of the *Labour Relations Act*.

23. This brings us to the issue of "the like bargaining unit." Section 63 protects existing bargaining rights. Nowhere does the statute extend bargaining rights outside the geographical parameters of the certificate issued by the Board. See *Mountain View Dairy Ltd.*, [1967] OLRB Rep. Feb. 911. In the instant case, the trade union's bargaining rights were described in the following terms:

Having regard to the agreement of the parties, the Board finds all employees of the respondent in the City of Grimsby save and except forepersons and persons above the rank of foreperson, office staff, sales staff, students employed during holiday and vacation periods and persons regularly employed for not more than 24 hours per week, constitute a unit of employees of the respondent appropriate for collective bargaining.

It is clear, on the evidence, that this bargaining unit no longer exists. Maple Leaf is located at 5434 Tomken Road in the City of Mississauga. Had Sunnylea moved its own business to Mississauga for reasons free of anti-union animus, the bargaining rights of the trade union would not have followed the business. Such rights do not fix on the business wherever it is located but take their scope from the wording of the certificate issued by the Board and their purpose from the local labour market. See for example *Inglis Limited*, [1977] OLRB Rep. Mar. 128. The Board has said that this result ought to be no different simply because a transfer also includes a sale. See *Mountain View Dairy, supra*, at para. 4. In this regard the Board in the recent *Silverwood Dairies* case, [1980] OLRB Rep. Oct. 1526 observed:

Accordingly, the Board's jurisprudence demonstrates that the Board has consistently interpreted section 55 in such manner as to preserve but not extend existing bargaining rights. Although most of the reported

cases involve movement by the successor employer of the purchased business, *Canadian Trailmobile, supra*, demonstrates that similar principles are applicable to movement by the successor employer of its original business following the purchase of another business. A trade union with bargaining rights limited by geographic location for the original business of the successor employer ought not to be in any better position if the business is moved away from that geographic location in order to amalgamate it with a business purchased in another location, than it would be in if that business had merely been moved to the new location without any such amalgamation. Accordingly, in such circumstances the Board must consider the scope of the bargaining rights contained in the Collective Agreement for the original business in order to determine whether the new location is within that scope. If it is, then an intermingling at that location of employees of the original business with employees of the purchased business can be dealt with by the Board under section 55(6).

However, if a business is intentionally moved to escape the ambit of the certificate a remedy under section 89 may be fashioned to include a declaration that the affected trade union's bargaining rights flow to and bind the employer in the new location. See *Humpty Dumpty Foods Limited*, [1977] OLRB Rep. July 401. Thus the trade union's request for a declaration under section 63 that its bargaining rights bind Maple Leaf cannot be granted under section 63 and the application is dismissed. The extension of its bargaining rights to the Tomken Road location can only arise as a remedial response to the established allegations in its complaint filed under section 89. We therefore turn to this complaint.

24. The union alleges that the Sunnylea plant shutdown was designed to avoid and evade the collective bargaining obligation to the union and that Maple Leaf and Turkstra's, in knowingly assisting this effort, thereby violated the *Labour Relations Act*. The evidence reveals that discussions about the possible amalgamation of several existing egg grading businesses pre-existed the trade union's presence at the Sunnylea plant by several months. Indeed, Bruce Buckingham was approached by Andrew Tuvel as early as 1978 (as was Lammers), a fact supported by Zonneveld's interest in selling his Sunnylea property about the same time. Buckingham said Tuvel was concerned about his future and that of the industry's. There is also un rebutted evidence that the Grimsby location of Sunnylea was not suitable for expansion. The building was too small and located on top of the escarpment. Nor was the land suitably serviced. There is an absence of evidence that the real estate agents were instructed to avoid Grimsby in their searches. There is also direct and uncontested evidence that no suitable location existed in Grimsby. Given the expanded requirements of Maple Leaf, this fact is not improbable. A study was conducted by Thorne Riddell supporting the viability of an egg grading business with expanded volume and new efficient equipment. The evidence suggests that at all times Bruce Buckingham, as the moving force behind Maple Leaf, took the position that Jacob Zonneveld's problems with the trade union would be "dealt with" if and when they arose. The employees of Turkstra's were not represented by a trade union and that business was located in Burlington. The fact that Henry Lammers was willing to close his plant at that location and participate in transferring his business to the new location in the City of Mississauga supports Maple Leaf's assertion that the transfer of the two businesses was for bona fides business reasons and free of anti-union animus. The co-ordination of the closing of Sunnylea and the opening of Maple Leaf is also supportable on sound economic grounds and

does not evidence an anti-union scheme. In fact, the planning supports the complainant's contention that a sale of a business had occurred. Accordingly, we cannot find that Maple Leaf and Turkstra's were part of a conspiracy to evade the collective bargaining responsibilities of Sunnylea and by such participation violated the *Labour Relations Act*. Of importance here is the fact that Jacob Zonneveld does not control or participate in the control of Maple Leaf. Had that been the case and were we satisfied that Zonneveld's motivation in participating in Maple Leaf was to evade the bargaining rights of the trade union, many of the remedies requested by the trade union could well flow to Maple Leaf notwithstanding the otherwise innocent involvement of Buckingham, Lammers and Tuvel. We also point out that our holding in this respect assumes Tuvel to have been no more than a key employee of Sunnylea. Had Tuvel been found to be a principal our conclusion in this paragraph could have been different. We also note that if Zonneveld does become involved in the Maple Leaf business following the issuance of this decision, it is conceivable that the trade union might wish to seek a reconsideration of the findings herein. Whether such an application would be successful would obviously depend on the facts as they then exist. Beyond this, nothing more can be said.

25. Counsel for the trade union submitted that Zonneveld clearly went out of business by way of a sale for anti-union reasons and that knowledge of these reasons by the officers of Maple Leaf and Turkstra's is in itself sufficient to constitute a violation of the Act or, alternatively, sufficient to permit this Board to run a remedy against Maple Leaf for the unfair labour practices of Zonneveld and Sunnylea. There are a number of problems with this argument. First, we have already concluded that Maple Leaf and Turkstra's were not part of a conspiracy to defeat the union's rights under the Act and that Maple Leaf, while having bought Sunnylea's business, is not subject to the trade union's bargaining rights due to the bona fides relocation of the business in the City of Mississauga. We cannot see how knowledge of Zonneveld's motive can achieve the result the trade union proposes. No authority having the facts of this case was cited to support the union's submissions and with a key fact being the relocation of the business so that a like bargaining unit and the trade union's bargaining rights no longer exist. Secondly, there is considerable difficulty in finding, as a matter of law, that a successor can be primarily responsible for unfair labour practices committed by a predecessor employer. Sections 63(2) and (3) of the *Labour Relations Act* provide:

63.-(2) Where an employer who is bound by or is a party to a collective agreement with a trade union or council of trade unions sells his business, the person to whom the business has been sold is, until the Board otherwise declares, bound by the collective agreement as he had been a party thereto and, where an employer sells his business while an application for certification or termination of bargaining rights to which he is a party is before the Board, the person to whom the business has been sold is, until the Board otherwise declares, the employer for the purposes of the application as if he were named as the employer in the application.

(3) Where an employer on behalf of whose employees a trade union or council of trade unions, as the case may be, has been certified as bargaining agent or has given or is entitled to give notice under section 14 or 53, sells his business, the trade union, or council of trade unions continues, until the Board otherwise declares, to be the bargaining agent

for the employees of the person to whom the business was sold in the like bargaining unit in that business, and the trade union or council of trade unions is entitled to give to the person to whom the business was sold a written notice of its desire to bargain with a view to making a collective agreement then in operation and such notice has the same effect as a notice under section 14 or 53, as the case requires.

26. With respect to section 63(2) it has been held that a successor employer is properly subjected to grievances relating to the conduct of a predecessor employer and this appears to be so whether or not the successor has actual notice of the collective agreement and whether or not the grievances were pending arbitration as the date of the sale. See *Man of Aran* (1974) 6 L.A.C. (2d) 238 (Shime). But this conclusion is heavily dependent on the wording of section 63(2). In *Woodbridge Hotel and International Beverage Dispensers and Bartenders' Union, Local 280* (1976), 13 L.A.C. (2d) 96 (Brown) a business was sold after the negotiation of a collective agreement and a dispute arose over the successor employer's obligation to pay retroactive wage and cost of living increases for the period preceding the sale. In holding that the new employer was so obligated, the Board of arbitration held:

These are the terms which the previous owners agreed to be bound by, and those terms are retroactive in effect, so that the successor employer under the Act, is bound in the same manner as if he had been a party. The grievance is therefore properly filed under the terms of the collective agreement, and the union is entitled to assert its claim, which is deemed to be in effect for the purposes of the new owners on March 26, 1975. Those terms apply retroactively and quite independently of any other commercial law application. The successor owners are deemed to be aware of their requirements under the *Labour Relations Act* which specifically specify their obligations.

As the sale of the hotel fell within the definition of s. 55 of the *Labour Relations Act*, the present owners are bound as parties of the collective agreement entered into on April 30, 1975, which provides for retroactive payments, in schedule C(2) and schedule G — cost-of-living allowance. In that schedule it is provided:

The parties agree that for the purposes of this agreement, the consumer's price index for the month of October, 1974, shall be the current index. Commencing with the month of April, 1975, and each six months thereafter during the life of this agreement a cost-of-living adjustment equal to 1¢ per hour for each 50-100 of a point. (.50) rise over and above a 5 point rise in a corresponding six months shall be made for all hours worked by an employee during those previous six months.

The collective agreement entered into on April 30, 1975, provides in art. 18 thereof: "This agreement shall be in effect from the first day of November, 1974 and shall continue in effect until the thirty-first day of October, 1976 . . .". There is therefore no question of retroactive effect for the purposes of the parties to that collective agreement, which includes

the present owners. The indicated lack of knowledge of a successor employer has been dealt with in the previous arbitration award of Mr. Shime in *Re Man of Aran Ltd. and Int'l Beverage Dispensers' and Bartenders' Union, Local 280* (1974), 6 L.A.C. (2d) 238, at p. 240-1, where the board stated:

The lack of knowledge of the existence of the collective agreement is not by itself a defence to the discharge of the employees. The purchaser of a business is under some obligation to ascertain all the outstanding obligations when it purchases the business. Indeed, it is not uncommon that covenants in that regard are obtained when a business is sold.

This is similar to the situation before us that when the business was sold, the new owners are deemed to be bound by the collective agreement in existence at that time under s. 55 of the Act, unless the board otherwise declares, which it has not.

In *Kelly Douglas and Company Limited*, [1974] 1 Can. LRBR 77 the B. C. Board commented:

It is up to the prospective purchaser to investigate the terms of the bargain which its predecessor has made with the trade union and see that this is taken account of in the purchase price of the takeover before it steps into the shoes of the old employer. (p. 82)

27. The Ontario High Court has approved this approach. In *Re United Brotherhood of Carpenters & Joiners of America, Local 3054 and Cassin-Remco Ltd. et al* (1980), 105 D.L.R. (3d) 138 it was held that an arbitration award and writs of execution issued against a predecessor employer were enforceable against a successor. In making this ruling and after reproducing section 55(2) (as it then was) Mr. Justice Steele wrote:

This is a statement of law and is applicable to a purchaser of a business whether or not he has notice of a collective agreement. I am, therefore, of the opinion that neither prejudice nor the doctrine of innocent purchaser have any application.

For the reasons that I will give, I need not and should not comment upon the Board's decision of January 8, 1979, with respect to prematurity.

The respondents submitted that in interpreting the object of s. 55 of the *Labour Relations Act*, consideration must be given to the provisions of the *Creditors' Relief Act*, R.S.O. 1970, c. 97, s. 3, and to the *Execution Act*, R.S.O. 1970, c. 152, s. 3. The following is s. 3 of the *Creditors' Relief Act*:

3. Subject to this Act, there is no priority among creditors by execution from the Supreme Court or from a county court.

The provisions of ss. 2 and 3 of the *Execution Act* relate to certain exempt chattels and the disposition thereof.

Basically, the argument was that there cannot be any priority among creditors by execution and that where the Legislature intended chattels or items to be exempt from seizure or execution then they have said so, and that by implication the provisions of s. 55 of the *Labour Relations Act* having made no such provision, and the *Execution Act* having made no such provision, no priority be given to the execution held by a labour union.

While there is merit in this argument, I am of the opinion that Rule 546 [am. O. Reg. 32/78, s. 4] relates to the party liable to execution and not priorities among execution creditors. Cassin-Remco Limited was originally the party liable as one of the signatories to the collective agreement. The provisions of s. 55 of the *Labour Relations Act* make it clear that the person to whom the business has been sold is bound by the collective agreement as if he had been a party thereto. By reason of the decision of the Board, I am of the opinion that Assaf and Fashion Craft are parties liable to execution under the provisions of Rule 546.

One of the principal arguments advanced by the respondents was that the award of the arbitrators resulting in the execution took place after the receiver had gone into possession and that the receiver had priority over this execution and that once the assets had been sold by the receiver under the terms of the debenture, that the purchaser took clear of all executions. It was submitted that to hold otherwise would place the union's execution in a different situation than all the other execution in a different situation than all the other executions outstanding against Cassin-Remco's assets.

While there may be an interesting argument on the issue of whether the collective agreement having been signed prior to the debenture being executed that it had priority over the debenture, or that the debenture was executed prior to the grievance having been filed, or that the grievance was filed before there was a default under the debenture, I think that the issue of priorities is immaterial. I am of the opinion that the *Labour Relations Act* creates a special status for collective agreements outside the purview of the general law.

Section 55 of the *Labour Relations Act* provides that the purchaser of a business shall be deemed to be the original signatory to the collective agreement. Therefore, both the union and the purchaser are bound by the terms of the agreement including its benefits and detriments. A benefit may be wage rates differing from those prevailing in the industry. A detriment may be an outstanding grievance or, in this case, an execution filed as a result of an arbitrators' award. In other words, the terms and conditions of a labour agreement flow with the business and once the purchaser has acquired the business then he is obligated to all of the matters that are included within it.

In this case, the purchasers are liable as a party to the award and, by reason of Rule 546, it is appropriate that the order go granting leave to issue execution against Assaf and Fashion Craft in the amounts set out in the writs of execution against Cassin-Remco Limited including interest as specified therein from October 17, 1978.

To hold otherwise would frustrate the intent of the *Labour Relations Act* and would impede the processing of grievances that are ongoing within a collective agreement. It would mean that while companies were in financial difficulties, no grievances under the agreement would be pursued because there would be a danger that any decision resulting therefrom would be nullified by a subsequent sale of the assets whereas if the grievance were not filed until after the sale then the usual results would flow from it.

The Canada Board has taken a similar approach to collective agreement obligations while acknowledging that section 144(2)(c) of the Code is not as explicit. In its view the clear intention of the Code is to the same effect. See *NABET and Radio CJYQ Ltd.* (1978), 1 Can. LRBR 565.

28. The Canada and British Columbia labour boards have also adopted a somewhat similar approach with respect to unfair labour practices or board orders existing at the time of a sale, but the sale of business provisions in those jurisdictions are quite differently worded from section 63(3) of our Act. Section 53(1) of the *British Columbia Labour Code* provides:

53(1). Where a business or a substantial part of the entire assets thereof, are sold, leased, transferred, or otherwise disposed of, *the purchaser, lessee or transferee is bound by all the proceedings under this Act before the date of the sale, lease, transfer or other disposition, and the proceedings shall continue as if no change had occurred;* and, where a collective agreement is in force that agreement continues to bind the purchaser, lessee, or transferee to the same extent as if it had been signed by him.

[emphasis added]

Section 144(2) of the *Canada Labour Code* reads:

144(1) In this section,

'business' means any federal work, undertaking or business and any part thereof;

'sell' in relation to a business, includes the lease, transfer and other disposition of the business.

(2) Subject to subsection (3), where an employer sells his business,

• • •

(d) *the person to whom the business is sold becomes a party to any*

proceeding taken under this Part that is pending on the date on which the business was sold and that affects the employees employed in the business or their bargaining agent.

[emphasis added]

29. In *Uncle Ben's Industries Ltd.*, [1979] 2 Can. LRBR 126 a union was seeking severance pay pursuant to a guaranteed wage plan contained in a collective agreement. However, at the date of the purchase no collective agreement was in force and the union had not yet initiated any proceedings before the Board with respect to the claim. In dismissing the claim the Board had the following to say about the meaning of "proceedings" as that term is used in section 53(1):

There are two arms to the section. The first arm binds the purchaser to all the proceedings under the Labour Code. "Proceedings" is not defined in the Code. The meaning which first springs to mind would include matters which have either been determined or are pending before the Labour Relations Board. These would include complaints under Section 8, certifications, prior determinations under Section 53, complaints under Section 96, and in general the various mandatory and declaratory orders which the Board might have made, or might be in the process of making. This interpretation may be defended on the ground that a purchaser could determine from this Board whether there was any application to it or existing order from it which related to the vendor in question. This interpretation of "proceedings" has significant negative implications as well, since it may follow that a purchaser would not be bound by "proceedings" which had not been commenced at this date of purchase. In the present case, for example, the Section 96 and Section 53 claims were not made until eight days after the purchase.

To further complicate matters, the purchaser and the Union signed a new Collective Agreement, but excluded or preserved the Union's on-going claims under Section 96 and 53. [Section 53 claims would have to be kept separate from the "search" or "Notice" arguments, since they will by definition arise upon or after the transfer.]

A considerably wider interpretation of "proceedings under this Act" would include in its ambit all proceedings arising under Collective Agreements, on the ground that the Act sets forth a statutory scheme for settling all such grievances — see Section 92(2). We consider this interpretation too wide for the definition of "proceedings", especially in view of what we will say below, and prefer the first interpretation.

30. A similar approach was taken by the Canada Labour Relations Board with respect to unfair labour practice proceedings pending at the time of a business sale. In *Victoria Flying Services Ltd.*, [1979] 3 Can. LRBR 216 the Board directed reinstatement and compensation to two complainants dismissed in contravention of the Code. This order was dated February 11, 1977. The decision was appealed and the appeal dismissed November 27, 1977. In between these two dates the employer sold the business on June 1, 1977. In holding that the successor employer was obligated to reinstate and compensate the complainants the Board wrote:

Having determined that a sale of business occurred on June 1, 1977 between V.F.S. as vendor and W.C.A., J.A. and C.A. as purchasers, we find that these three companies, according to section 144(2)(d), became bound by the proceedings under this part to which V.F.S. was a party. On June 1, 1977, the certification decision and the unfair labour practices decisions in favour of Messrs. Oncescu and Douglas were pending. At the hearing, C.B.R.T. announced that it was not seeking to enforce the transfer of the certificate issued by the Board so we need not here discuss who would have been bound by the certification issued in favour of C.B.R.T. As regards to the sale of business, we are only concerned with the liability for the reinstatement and compensation of both Mr. Oncescu and Mr. Douglas.

31. Without any successor rights provision at all, the National Labor Relations Board has adopted a similar approach with respect to pending unfair labour practice proceedings, decisions, and orders. In *Perma Vinyl Corporation* (1967), 164 NLRB 969 the purchaser of a business entered into a sale with knowledge that unfair labour practice proceedings were pending against the vendor. Indeed, the sale occurred after the hearing in those proceedings but before the issuance of any decision. Overruling its earlier decisions to the contrary, the Board concluded that both companies were jointly and severally responsible to comply with the compensation and reinstatement order. In so holding, the Board wrote:

... To further the public interest involved in effectuating the policies of the Act and achieve the "objectives of national labor policy, reflected in established principles of federal law, we are persuaded that one who acquires and operates a business of an employer found guilty of unfair labor practices in basically unchanged form under circumstances which charge him with notice of unfair labor practice charges against his predecessor should be held responsible for remedying his predecessor's unlawful conduct.

In imposing this responsibility upon a bona fide purchaser, we are not unmindful of the fact that he was not a party to the unfair labor practices and continues to operate the business without any connection with his predecessor. However, in balancing the equities involved there are other significant factors which must be taken into account. Thus, "It is the employing industry that is sought to be regulated and brought within the corrective and remedial provisions of the Act in the interest of industrial peace." When a new employer is substituted in the employing industry there has been no real change in the employing industry insofar as the victims of past unfair labor practices are concerned, or the need for remedying those unfair labor practices. Appropriate steps must still be taken if the effects of the unfair labor practices are to be erased and all employees reassured of their statutory rights. And it is the successor who has taken over control of the business who is generally in the best position to remedy such unfair labor practices most effectively. The imposition of this responsibility upon even the bona fide purchaser does not work an unfair hardship upon him. When he substituted himself in place of the perpetrator of the unfair labor practices, he became the beneficiary of the

predecessor's unfair labor practices. Also, his potential liability for remedying the unfair labor practices is a matter which can be reflected in the price he pays for the business, or he may secure an indemnity clause in the sales contract which will indemnify him for liability arising from the seller's unfair labor practices.

32. This approach was reviewed by the United States Supreme Court in *Golden State Bottling Company Inc.* (1973) 73 CCH ¶14,124 where a successor employer bought a business with knowledge of an outstanding Board order directing the reinstatement of an employee dismissed by the predecessor employer for union activity. The successor, as was emphasized in *Perma Vinyl* also continued to operate the business as it had been operated without change. In upholding the principles first outlined in *Perma Vinyl* the Court held:

[Liability of Successor]

We agree that the Board's remedial powers under s.10(c) include broad discretion to fashion and issue the order before us as relief adequate to achieve the ends, and effectuate the policies, of the Act. Early on, this Court recognized that s. 10(c) does not limit the Board's remedial powers to the actual perpetrator of an unfair labor practice and thereby prevent the Board from issuing orders binding a successor who did not itself commit the unlawful act. We have said that a Board order that, as in this case, runs to the "officers, agents, successors and assigns" of an offending employer, may be applied not only to a new employer "merely a disguised continuance of the old employer." *Southport Petroleum Co. v. NLRB*, [5 LC ¶51,126] 315 U.S. 100, 106 (1942), but also "in appropriate circumstances . . . [to] those to whom the business may have been transferred, whether as a means of evading the judgment or for other reasons." *Regal Knitwear Co. v. NLRB*, [9 LC ¶51,193] 324 U.S. 9, 14 (1945) (emphasis added; see also *NLRB v. Ozard Hardwood Co.*, [40 LC ¶66,759] 282 F. 2d 1, 5 (1960). If the words "person named in the complaint engaged in . . . any unfair labor practice" in s. 10(c) do not restrict Board authority to prevent orders running to the offending employer's successors and assigns who have acquired the business as a means of evading the Board order, we do not see how those words may be read to bar the Board from issuing reinstatement and back-pay orders against bona fide successors when the Board has properly found such orders to be necessary to protect the public interest in effectuating the policies of the Act. The Board's orders run to the evader and the bona fide purchaser not because to act of evasion or the bona fide purchase is an unfair labor practice, but because the Board is obligated to effectuate the policies of the Act. Construing s. 10(c) thusly to grant the Board remedial power to issue such orders results in a reading of the section, as it should be read, in the light of "the provisions of the whole law, and . . . its object and policy." *Mastro Plastics Corp. v. NLRB* [129 LC ¶69,779] 350 U.S. 270, 285 (1956); see *NLRB v. Lion Oil Co.*, [31 LC ¶70,446] 352 U.S. 282, 288 (1957).

[Policy of Act]

We in no way qualify the *Burns*' holdings in concluding that the Board's order against All American strikes an equitable balance. When a new employer, such as All American, has acquired substantial assets of its predecessor and continued, without interruption or substantial change, the predecessor's business operations, those employees who have been retained will understandably view their job situations as essentially unaltered. Under these circumstances, the employees may well perceive the successor's failure to remedy the predecessor employer's unfair labor practices arising out of an unlawful discharge as a continuation of the predecessor's labor policies. To the extent that the employees' legitimate expectation is that the unfair labor practices will be remedied, a successor's failure to do so may result in labor unrest as the employees engage in collective activity to force remedial action. Similarly, if the employees indentify the new employer's labor policies with those of the predecessor but do not take collective action, the successor may benefit from the unfair labor practices due to a continuing deterrent effect on union activities. Moreover, the Board's experience may reasonably lead it to believe that employers intent on suppressing union activity may select for discharge those employees most actively engaged in union affairs, so that a failure to reinstate may result in a leadership vacuum in the bargaining unit. *CF. Phelps Dodge Corp. v. NLRB* [4 LC ¶ 51,120] 313 U.S. 177, 193 (1941). Further, unlike *Burns*, where an important labor policy opposed saddling the successor employer with the obligations of the collective bargaining agreement, there is no underlying congressional policy here militating against the imposition of liability.

Avoidance of labor strife, prevention of a deterrent effect on the exercise of rights guaranteed employees by s. 7 of the Act, 29 U.S.C. s. 57, and protection for the victimized employee—all important policies subserved by the National Labor Relations Act, see 29 U.S.C. s. 141 — are achieved at a relatively minimal cost to the bona fide successor. Since the successor must have notice before liability can be imposed, "his potential liability for remedying the unfair labor practices is a matter which can be reflected in the price he pays for the business, or he may secure an indemnity clause in the sales contract which will indemnify him for liability arising from the seller's unfair labor practices." *Perma Vinyl Corp., supra*, 164 NLRB, at 969. If the reinstated employee does not effectively perform, he may, of course, be discharged for cause. See 29 U.S.C. s. 160(c).

33. However, none of the cases arising in other jurisdictions support the result requested by the trade union on the facts before us. No proceedings were pending before the Board which the trade union now seeks to enforce and the business was not continued unchanged to trigger the rationale set out in the latter part of the *Golden State* decision. Counsel for the trade union contended that Maple Leaf had notice of Sunnylea's anti-union intent in disposing of its business and that this was knowledge of an unfair labour practice within the meaning of the American approach. But both *Golden State* and *Perma Vinyl*

involved outstanding unfair labour practice proceedings. The purchaser had notice or could have been aware of such proceedings and their potential outcome could have been taken into account. It is quite another matter to make a vendor responsible for all actions of the purchaser which the vendor has notice of and which could be unfair labour practices even though no complaint has been filed. How could these matters realistically be taken into account? The vendor could deny that the actions were improper and point to the fact that there has been no complaint. Admittedly, the trade union could not have filed a complaint before the sale because the sale is the very act complained of. But this is no reason for ignoring the situation in which the union's argument places Maple Leaf. Given the great complexity in this case; the fact that the business was moved; and Maple Leaf's awareness of Zonneveld's financial predicament, we fail to see how the commercial negotiations could realistically have taken the union's potential claim into account. Thus, even if the combined wording of section 63 and 89 permits us to do what the trade union has requested, we deny the request.

34. We now turn to whether Jacob Zonneveld and Sunnylea violated the *Labour Relations Act* in closing the Sunnylea Grimsby plant in October of 1980. There have been a number of cases before this Board involving a similar issue. See *Webster & Horsfall (Canada) Ltd.*, [1969] OLRB Rep. Sept. 780; *Humpty Dumpty Foods Limited*, [1977] OLRB Rep. July 401; *Academy of Medicine*, [1977] OLRB Rep. Dec. 783; and *Westinghouse Canada Limited*, [1980] OLRB Rep. April 577. American cases make a distinction between a complete closure by a single employer and the closure of part of a business, holding that under the *Wagner Act* an employer has the absolute right to terminate his entire business for any reason he pleases no matter what the reasons. On the other hand, temporary closings, runaway shops and partial closings are prohibited where motivated by anti-union considerations because of the benefits the employer may intend to reap by discouraging other or future employees from engaging in collective bargaining. See *Textile Workers v. Darlington Mfg. Co.* (1965), 58 LRRM 2657. The Ontario Board has expressly disagreed with this distinction and relying on section 77, has held that an employer may not even terminate his entire business if the motive is contrary to the *Labour Relations Act*. In *Academy of Medicine*, [1977] OLRB Rep. Dec. 783 the Board wrote:

There is nothing, moreover, in the general scheme of the Act which would suggest that an employer may, with impunity, terminate its entire business rather than operate with a union. The *Labour Relations Act* is based on the policy (embodied in the preamble) that collective bargaining, with the right to strike and lock-out, in the event of an ultimate impasse, is the preferred method of settling the terms and conditions of employment between employers and employees in the Province. To ensure the achievement of this policy, the Act establishes procedures for the acquisition of bargaining rights and mandates certain practices and conduct to encourage and regulate the collective bargaining relationship once established. The unfair labour practice sections of the Act, taken together, constitute a general prohibition against any kind of anti-union conduct. These sections are designed to protect the basic right of employees to join a trade union and to participate in its lawful activities, as well as the right of unions to organize and represent employees, free from employer interference. It is difficult to conceive of conduct more destructive of these rights than a permanent

closure of a business, based not upon legitimate business considerations but upon an employer's simple refusal to operate with a trade union. If the Board were to hold that such conduct is permissible under the Act, it would be giving carte blanche to employers, such as the respondent, with a "discontinuance" capacity to frustrate the policy which the Statute so clearly prescribes. The respondent's threat to close its Call Answering Service if the union was successful constitutes a clear violation of *The Labour Relations Act*. It would be strange indeed if the total effectuation of that threat — the permanent discontinuance of its Answering Service — did not also constitute a violation. It would be stranger still if an employer violates the Act by firing some of its employees for their union membership or activity, but not by firing them all.

35. In determining motive it is relevant to note, as the trade union emphasized, the earlier unfair labour practices of Sunnylea that marked the certification proceedings. By decision dated June 1980 the Board found that Virginia Neufeld had been discharged by Sunnylea on February 1980 contrary to the *Labour Relations Act*. By decision dated March 13, 1980 the Board found that Robert Berton and Debbie Henson were discharged contrary to the Act. And by decision dated April 30, 1980 the Board found that four other employees had been laid off contrary to the Act and that Jack and Leen Zonneveld had unlawfully threatened to close Sunnylea if the union was certified. However, Zonneveld testified before this panel that Sunnylea was "dead" the moment the Royal Bank in Grimsby requested Sunnylea to move its business and it is clear he had been looking for a purchaser since October 1978. Thus, it was submitted that the actual sale of the Sunnylea business and the presence of the trade union were coincidental and that Zonneveld and Sunnylea were motivated only by economic considerations. The matter of motive is further complicated by Zonneveld's testimony that the union was always on his mind and that the joy went out of running his business with its arrival; that he could not have continued the business with the presence of the union and had he been able to carry on economically he would have fought the trade union until the employees lost interest; and, that with the certification of the trade union he had the options of closing his business, selling it, or seeking an amalgamation. We are also satisfied that on the evidence before us the treatment of Berton was primarily based on his support for the trade union. No attempt was made to contact Berton's doctor about his ability to drive and, having regard to all the surrounding circumstances, his assignment to an even more physically demanding job can only be seen as punishment for his union activity. The issue is whether Sunnylea and Zonneveld, in closing and selling Sunnylea's business, were also motivated in whole or in part by anti-union considerations. It is not sufficient for the respondents to demonstrate that their predominate motive was economic in nature. As the Board said in *Westinghouse Canada Limited, supra*, at para. 50:

The *Labour Relations Act* is based on the policy of collective representation of employees as the preferred method of regulating employer/employee relations. The Act establishes a legal framework within which employees are free to join together, bargain collectively and take collective economic action at certain prescribed times. The unfair labour practice sections of the act prohibit a broad range of anti-union conduct and serve to protect employees in the exercise of the basic rights accorded under the statute. This Board, with judicial support, has held that any employer action against an individual employee which is even

partly motivated by anti-union sentiment is in violation of the Act, notwithstanding the coexistence of legitimate business purpose. Having regard to the policy underpinnings of the Act and the degree of anti-union motive necessary to cause an unfair labour practice finding in respect of actions taken against an individual employee, it would seem unusual to conclude that a major business decision taken even in part for anti-union reasons, and having a major adverse impact upon the economic lives of a number of employees, is permissible under the Act. This, however, is the precise result which flows from the approach urged upon us.

36. There can be little doubt that Zonneveld's previous actions, reviewed in other Board decisions and his testimony before us, reveal a strong anti-union sentiment arising, of course, out of a religious conviction. Indeed, the purport of the trade union's case was that given Zonneveld's admissions under cross-examination and the background to the case, it was impossible for Zonneveld to prove the closing was free of anti-union animus. However, the trade union did not dispute Sunnylea's financial situation and the related fact that it had been asked by the Royal Bank to take its business elsewhere. It was also accepted that the entire proceeds of the sale went directly to the Canadian Imperial Bank of Commerce to reduce Sunnylea's substantial indebtedness. The evidence establishes that Sunnylea was for sale before the trade union arrived on the scene and that the very business discussions leading to the contested sale commenced before the trade union organized the employees of Sunnylea. We are also satisfied that the failure of Sunnylea to raise the matter of the sale in the bargaining process was related to business considerations and does not evidence an anti-union animus. While it may have been a breach of section 15, this aspect of the facts was not argued before us. Considering all of these facts and the other evidence before us, we have come to the conclusion, on the balance of probabilities, that the sale would have occurred with or without the presence of the trade union and that it was therefore economically and only economically motivated. Indeed, the evidence is strong that Sunnylea would have gone out of business sooner had it not been for the interest of W. B. Cross and its related temporary financial assistance through the Canadian Imperial Bank of Commerce. We might add that even if we had concluded that the sale was not entirely free of anti-union animus, the evidence does not indicate to us that the business was sufficiently viable to carry on much beyond what it did. Accordingly, only a nominal remedy would have been justified.

37. On the other hand, we are satisfied on the evidence that the former employees of Sunnylea who applied for employment in October 22, 1980 at Maple Leaf were not hired because of their earlier trade union activity and suspected support of the complainant trade union. Maple Leaf's commuting policy was not uniformly applied. Lammers had specific knowledge from Tuvel that the employees had been involved in earlier proceedings before the Board; and, most importantly, Lammers admitted that he might have hired them had they attended on another day. With respect to this latter admission, no explanation was given as to why they were not called or offered work on the basis of their applications for employment which they had left with Maple Leaf. Having regard to all of the evidence and the manner in which Lammers gave his testimony, we think it more probable than not that they were refused employment because of their suspected trade union activity. They are, therefore, entitled to be hired and to monetary compensation with interest for their losses occasioned by this breach of the Act. See *Metropolitan Parking Inc.*, [1979] OLRB Rep. Dec. 1193. We agreed to retain jurisdiction on the issue of remedy and any difference between the parties on this issue can be

referred back to us by either party. We also direct the respondent Maple Leaf to post copies of the attached notice in its plant for 60 days. There is likely to be much confusion in the plant on the reinstatement of the grievors and all employees are entitled to know the background of this action of the Board.

38. The respondents Sunnylea and Jacob Zonneveld, based on our findings above, are directed to compensate Robert Berton with interest for the monetary losses experienced because of his unlawful treatment. Authority for this ruling going against Zonneveld personally can be found in the general wording of sections 64, 66 and 89 of the *Labour Relations Act*. Sections 64 and 66 directly refer to persons acting on behalf of any employer and section 89 contains equally broad language. With the greatest of respect to my colleague, Mr. Ronson, I am not aware of the policy to which he refers. I can conceive of a number of situations where it would be appropriate to name the person responsible for the unfair labour practice where that person is primarily in control of the employing entity or other organization. It is my view that this is such a case. Jacob Zonneveld, for all intents and purposes, is Sunnylea and Sunnylea is no longer in business. No matter how mild the remedy, it is one that the complainant should be able to pursue against the ongoing activities of Mr. Zonneveld. Indeed, had the complainant's core allegations been established, a remedy confined to Sunnylea may have been quite ineffective. If the potential for personal liability is not understood in the labour relations community, I would hope this decision sheds some light on the matter.

39. To summarize our ruling:

- (a) The application under section 63 is dismissed.
- (b) The respondents Sunnylea and Zonneveld are directed to compensate Robert Berton with interest for all losses sustained because of his unlawful termination.
- (c) The respondent Maple Leaf is directed to post copies of the attached notice marked "Appendix" after being duly signed by a Maple Leaf representative, in conspicuous places on its premises in the City of Mississauga where it is likely to come to the attention of the employees, and to keep the notices posted for sixty consecutive working days. Reasonable steps shall be taken by the respondent Maple Leaf to ensure that the said notices are not altered, defaced or covered by any other material. Reasonable physical access to the premises shall be given by the respondent Maple Leaf to a representative of the complainant so that the complainant can satisfy itself that this posting requirement is being complied with. The respondent Maple Leaf is also directed to offer employment and to compensate with interest Harvey Crowe, Sandra Rattle, Debbie Henson, Candy Morris, Denise Dochstader, and Kathy Travis. Differences over the amount of such compensation can be referred to the Board by either party.
- (d) All other requests for relief and related allegations of violations are dismissed.

- (e) All interest directed to be paid under this order should be calculated according to the Board's Practice Note number 13, published in [1980] OLRB Rep. September.

DECISION OF BOARD MEMBER, JAMES A. RONSON;

1. I agree with the findings of fact and the remedies ordered by the Chairman in his decision, save for the following remedy with which I disagree.

2. In paragraph 39, the respondent Jacob Zonneveld is ordered to personally compensate Robert Berton for his monetary losses. It has never been the policy of this Board to make employees and/or shareholders of a limited company personally liable for payment of compensation pursuant to a Board order. There are three specific reasons why I disagree with such an order in this case:

- (a) a settlement was pleaded and we heard no evidence (other than that it was without prejudice) to indicate that Mr. Berton suffered a loss;

- (b) over 6 months went by before the union brought this specific complaint; and

- (c) the only reason to deviate from Board policy would be that Mr. Zonneveld deliberately closed his business for anti-union reasons and created a situation in which an order for compensation would be worthless as against the limited company. That is *not* the finding of the majority of this panel.

DECISION OF BOARD MEMBER, W. F. RUTHERFORD;

I concur with the facts presented in the Board's decision, including the Board's order to the respondent Maple Leaf. Regarding the respondent Jacob Zonneveld, I would have expanded the Board's order to include the organizational, negotiating, and legal costs incurred in any action involving Sunnylea.

I base this opinion on my reading of the evidence presented. Jacob Zonneveld made his anti-union policy public knowledge in a Globe and Mail interview; his answer to charges substantiated before the Labour Board of anti-union actions against leading union employees at Sunnylea. Further in evidence he stated he knew he was closing the business while first contract negotiations were proceeding. This knowledge of the proposed closing was not transmitted to the union officially until the day after it had been posted in the plant.

I would find that Jacob Zonneveld, knowing he was going out of business, had his representative in negotiations "surface bargain" while the transfer of operations to Maple Leaf was being concluded, thereby further increasing union costs.

The above is a capsule of my opinion why Jacob Zonneveld's costs should be expanded in this action before the Board.

The Labour Relations Act

1671

NOTICE TO EMPLOYEES

Posted by Order of the Ontario Labour Relations Board

We have posted this notice in compliance with an order of the Ontario Labour Relations Board issued after a hearing in which we and the complainant union participated. The Ontario Labour Relations Board found that we violated the Labour Relations Act, by failing to hire Harvey Crowe, Sandra Rattle, Debbie Henson, Candy Morris, Denise Dochstader and Kathy Travis.

The Act gives all employees these rights;

To organize themselves;

To form, join and participate in the lawful activities of a trade union;

To act together for collective bargaining;

To refuse to do any and all of these things.

We assure all our employees that:

WE WILL NOT do anything that interferes with these rights.

WE WILL hire Harvey Crowe, Sandra Rattle, Debbie Henson, Candy Morris, Denise Dochstader and Kathy Travis.

WE WILL make monetary compensation with interest to these individuals for their losses occasioned by the breach of the Act.

MAPLE LEAF EGG PRODUCTS LTD.

Per: (Authorized Representative)

This is an official notice of the Board and must not be removed or defaced.

This notice must remain posted for 60 consecutive working days.

1457-81-R Service Employees Union, Local 204 Affiliated with A.F. of L., C.I.O., C.L.C., Applicant v. Toronto East General and Orthopaedic Hospital Inc., Respondent, v. Group of Employees, Objectors.

Bargaining Unit – Employee – Parties agreeing to include pharmacists in paramedical unit – Pharmacists seeking exclusion – Whether exercising managerial functions – Whether sharing community of interest with paramedical employees – Board policy on professional and paramedical employee units

BEFORE: M. G. Mitchnick, Vice-Chairman, and Board Members D. B. Archer and H. J. F. Ade.

APPEARANCES: Ron Davidson for the applicant; Wallace M. Kenny, Allan Prowse, Gary Lee and Anil Pabani for the respondent; Susan Logan, Janet Bouchier, Leslie Lam and Ming-Tak. P. Law for the objectors.

DECISION OF THE BOARD; November 24, 1981

1. This is an application for certification.
2. The Board finds that the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act*.
3. The application deals with paramedical employees at the respondent Hospital who are not already represented by a trade union in collective bargaining. The applicant and respondent were in agreement on a full-time and part-time bargaining unit which, subject to certain clarity notes, can be described as follows:

Bargaining unit #1:

All paramedical employees of the respondent in the Municipality of Metropolitan Toronto save and except supervisors, persons above the rank of supervisor, persons regularly employed for not more than twenty-four (24) hours per week, students employed during the school or university vacation period, persons covered by subsisting collective agreements, and persons covered under bargaining rights held by The Association of Allied Health Professionals.

Bargaining unit #2:

All paramedical employees of the respondent in the Municipality of Metropolitan Toronto regularly employed for not more than twenty-four (24) hours per week and students employed during the school or university vacation period, save and except supervisors, persons above the rank of supervisor, persons covered by subsisting collective agreements and persons covered under bargaining rights held by The Association of Allied Health Professionals.

“Paramedical employees” in this application include occupational therapists, pharmacists,

psychologists and psychometrists, social workers, speech pathologists and audiologists, and physiotherapists.

4. The respondent further requests the exclusion of “persons employed in a confidential capacity in matters relating to labour relations”, as that expression is used in section 1(3)(b) of the Act. While agreeing that such exclusion should not be necessary, in light of the express provisions of the statute, the respondent bases its request on a desire to avoid any uncertainty in the future dealing either with the applicant or with an arbitrator appointed to interpret the anticipated collective agreement.

5. It is not the Board’s practice in describing bargaining units in its certificates to repeat the express provisions of the *Labour Relations Act*. From the scheme of the Act itself, including the provisions of section 106(2), it is patent to the Board that parties cannot enter into a “collective agreement” under the Act which includes both “employees” and persons specifically excluded from “employee” status by section 1(3)(b) of the Act. The only real question appears to be whether the determination of “employee” status under the Act is one that can be made only by the Ontario Labour Relations Board, or whether it can be made by an arbitrator in conjunction with other issues arising under a collective agreement. See *Nelson Crushed Stone*, [1980] OLRB Rep. Oct. 1500; *Canadian Industries Ltd.*, (1972) 3 O.R. 63; *Re Miller et al and Algoma Steelworkers Credit Union*, 75 CLLC ¶14,289; *Re General Concrete*, (1978) 22 O.R. (2d) 65. Accordingly, the Board finds no reason to alter its practice in order to include the words being sought.

6. The only outstanding objection to the bargaining unit in this case comes from the pharmacists, whom the applicant and respondent have agreed are appropriately included in the two units. In a lengthy submission to the Board the pharmacists, of whom there are six in number, set out a number of grounds for their exclusion. In general terms, these grounds fall into two categories:

- (1) as professionals, the pharmacists do not share a community of interest with the other categories of employees whom the applicant seeks to represent; and
- (2) the pharmacists exercise certain supervisory responsibilities over the pharmacy employees that assist them.

7. Dealing with the “supervisory” ground first, in order to succeed in establishing an exclusion separate from the community of interest argument, the pharmacists must demonstrate that they exercise “managerial functions” within the meaning of section 1(3)(b) of the Act. There is no exclusion for “supervisory” responsibilities *per se*. The position which the pharmacists were taking did not become clear to the other parties until the hearing, in the latter stages of the bargaining-unit discussion, and the Board at that point entertained the evidence of the pharmacists. The respondent then sought to adduce the evidence of its Director of Pharmacy “to assist the Board in its inquiry”. The Board ruled that it would receive that evidence, on the assumption that it would be relevant, but without going so far as to entitle the respondent to reverse its position and renege on its own earlier agreement on the bargaining unit. The respondent argued that it was not aware of the position the pharmacists were taking at the time it prepared its response on the bargaining unit. The Board noted, however, that the scope of managerial authority within an employer’s own organization is a matter one could

expect to be within the knowledge of the employer, particularly since that authority flows from the employer itself.

8. The evidence of the Director of Pharmacy was at odds in certain respects with that of the two pharmacists who testified, the Director's being generally the more favourable from the point of view of supporting a managerial exclusion. The Director, however, appeared prone to overstating the pharmacists' responsibilities in a way that was not credible to the Board. The pharmacists, on the other hand, gave to the Board a full and candid account of their responsibilities, and it is upon this account that the Board relies in forming its conclusion.

9. The pharmacists work on a two-shift basis, and rotate from time to time through different areas of assignment. They report to the Director of Pharmacy and to an Assistant Director of Pharmacy, neither of whom are present on the evening or weekend shift. The subordinate employees whom the pharmacists supervise are made up of 4 pharmacy assistants, 2 pharmacy attendants, one maid and one aide. The pharmacists indicated that the 2 pharmacy attendants are also supervised by the pharmacy assistants. It is rare that any of the subordinate employees are asked to work the evening shift or Sundays. The pharmacists have been consulted from time to time for input into the department's policy manual on such items as job descriptions and hours of work for the employees they supervise. They do not actually schedule hours of work or vacations, but they do have the authority to retain an employee on overtime to complete a required task. The pharmacists do not grant days off, but if a subordinate employee requests permission to leave during a shift on an emergency basis, and the Director or her Assistant is not present, the pharmacist will exercise his judgment as to whether the employee can be spared. It is the pharmacists who perform the day-to-day task of assigning work to the subordinate employees, as the priorities of the day may require.

10. On the matter of discipline, the pharmacists in their submission rely heavily on their professional responsibilities under the *Health Disciplines Act*, R.S.O. 1980, c. 196 and the Proposed Standards of Practice for Ontario Pharmacists. It was the evidence of the pharmacists that if an employee appeared to be in an unfit condition to perform his or her duties on a shift where the pharmacist was the senior-most person present, the pharmacist would be entitled to send that employee home. The pharmacists indicated that no one in management told them they had that right, but feel that they must have it because they consider themselves legally responsible for the proper performance of all pharmaceutical services under their signature. The two pharmacists also alluded to a case in 1977 in which a pharmacy attendant was ultimately terminated upon the recommendation of all of the pharmacists, but this was before either of the two witnesses joined the staff, and there was no further elaboration of the role of the pharmacists in that incident. One of the pharmacists, Mr. Lam, testified that he had admonished one of his assistants a number of times for being unprofessional in his appearance, but that the assistant continued to ignore him. Mr. Lam accordingly went to the Director to take action, and the Director convened a meeting of herself, Mr. Lam and the assistant. The Director told the employee what was expected of him, and that action would be taken if his conduct did not improve. This was followed up by a letter signed by the Director. The pharmacists testified that they attend no meetings with management where employee matters are discussed, other than specific incidents such as the one just described.

11. The job description for the pharmacists contains two relevant items, being:

- “6. Supervising pharmacy assistants’ activities in dispensing, compounding and manufacturing.
- 7. Supervises and assists in the work of nonprofessional personnel.”

The pharmacists in their written submission point out:

“It may be seen that in all facets of pharmacy service the pharmacist is ultimately responsible and must exercise professional judgment.”

The Board accepts this assessment. However, as the Board noted, for example, in considering a group of psychologists in *Halton Board of Education*, [1978] OLRB Rep. March 299, at paragraph 3:

“In the instant case the Board is dealing with a group of professionals and must be careful not to confuse professional responsibility and competence with managerial function.”

Further, in *Essex Health Association*, [1970] OLRB Rep. Nov. 824, the Board noted, at paragraph 3:

“Professional or semi-professional employees such as head nurses have a different relationship with management in matters falling within their professional competence and the performance of their professional duties than employees engaged in production in other industries. While the criteria applied to determine whether professional or semi-professional persons exercise managerial functions are basically the same as with persons concerned with production, in applying such criteria a distinction must be made between functions which are of managerial nature and functions which are inherent in the exercise of such persons’ professional or technical skills.”

And again (in dealing with professional nurses) in *Peterborough Civic Hospital*, [1973] OLRB Rep. Mar. 154, the Board, at paragraph 10, commented:

“... Nurses will participate in the decision-making processes which are relevant in the hospital’s operations. Nurses are highly trained, and the combination of their training and experience permits them a consultative role which differs from employees in the industrial context; see *Ajax and Pickering General Hospital*, [1970] OLRB Rep. Feb. 1283.”

12. In the present case, the Board finds that the “supervision” exercised by the pharmacists is essentially that which emanates from their professional training and high standards of practice, rather than the assignment of truly “managerial functions” within the department (by contrast, see *G. Tambllyn Limited*, [1976] OLRB Rep. July 369). While this does not in any way detract from the importance of the supervision which they carry out, it does not justify an exclusion under section 1(3)(b) of the *Labour Relations Act*.

13. On the matter of community of interest, the submission of the pharmacists is essentially that they are professionals who, because of their status, training and judgmental

responsibilities, do not belong in a collective bargaining unit with "paramedical technical personnel"; nor do they feel the present applicant is qualified to represent them. Whether such grounds afford a sound and workable basis for splitting "paramedical" employees into more than one bargaining unit was exhaustively canvassed by the Board in *Stratford General Hospital*, [1976] OLRB Rep. Sept. 459, and again more recently in *Hôpital Montfort*, [1980] OLRB Rep. Nov. 1647.

14. In *Stratford General Hospital*, the Board addressed the broad question of whether a viable distinction could be made between so-called "professional" and "technical" paramedics. The Board observed, at page 496 ff:

Another point worth making at the outset is the inherent tension between the Board's responsibility to fashion practical bargaining structures and the equally important concept of freedom of association expressed in section 3 of *The Labour Relations Act*, R.S.O. 1970, c. 232, as amended. In *Ponderosa Steak House*, [1975] OLRB Rep. Jan 7 the Board expressed this relationship well in writing:

A primary theme set out in *The Labour Relations Act*, and affirmed by the Board, is the principle of freedom of association. ...

In other words, the Act recognizes that it is desirable that employees be able to organize in a form that corresponds with their own wishes. Given this legislative policy favouring the right of self-organization, the Board must be careful that its determination as to the appropriateness of the bargaining unit has given proper weight to the wishes of the employees. ... In giving due consideration to the wishes of the employees, the Board, in the absence of contrary evidence must assume that their wishes are expressed by the applicant union as the representative of the employees. ...

The right of self-organization, however, must at times compete with the need for viable and harmonious collective bargaining. Section 6 of the Act specifically requires the Board to determine, not just a unit of employees, but "the unit of employees that is appropriate for collective bargaining". In other words, the Board has a responsibility under the Act to create a rational and viable collective bargaining structure, even though the exercise of this responsibility may sometimes conflict with the right of self-organization. ...

The determination of what constitutes a viable collective bargaining structure requires the Board to consider matters of industrial relations policy, such as community of interest and fragmentation of employees. ...

• • •

The broadest principle of bargaining unit demarcation suggested in this case was a "professional/technical" distinction. ... Thus the first

step in our decision is to see if this distinction reflects a significant difference between the two groupings proposed and assess whether it results in a practical bargaining unit demarcation. . . .

Applying only these criteria to the facts at hand, we find that all of the occupations might merit the designation professional to a lesser or greater extent. All of the occupations require a not insignificant period of post-secondary education in a specialized institution that passes on the competence of a graduate, although important differences in the length and nature of training between occupations undoubtedly exist. Further, all the occupations are represented by associations that have promulgated codes of ethics to which members subscribe. As well, the associations have played important roles in the establishment of training programmes. . . .

Therefore, while this initial and generalized approach to the professional/technical dichotomy sheds some light on the competing interests that underlie this case, it does not reveal sufficiently distinct differences to support the request of AAHP. Indeed, if anything these two general criteria are supportive of the OPSEU application.

In becoming somewhat more specific . . . we find [Wilensky's] observation that there is a "process of professionalism" which some occupations complete and thereby come to be recognized as "professional" occupations very interesting. . . .

It can be seen that all the occupations appear to be proceeding along this so called "process to professionalization" and after reviewing each occupation's progress we are of the opinion that specific points along the process do not provide a clear enough demarcation for bargaining unit determination purposes. . . .

. . . But while general claims of professionalism do not, in our opinion, support two bargaining units, counsel of AAHP and many of its witnesses stressed the fact that the occupations, sought to be represented by AAHP have direct contact with the patient; are treatment oriented; belong to the health care team; and exercise independent judgment. In effect these arguments, really attempt to tailor the concept of a professional occupation to the health care industry. At the same time they get away from the qualifications of an employee and focus more on what the employee does. However after careful consideration we have concluded that these considerations neither alone nor collectively, provide a sufficiently clear line of demarcation. . . .

We now wish to examine the term paramedical. The term is worth considering because it is a term by which many appear to allocate occupations in this field . . . and secondly, because we think it does not provide the most relevant common denominator. Eliot Friedson . . . writes:

"The term "paramedical" refers to occupations organized around the work of healing which are ultimately controlled by physicians. . .

These characteristics are such that the paramedical occupations may be distinguished from established professions by their relative lack of autonomy, responsibility, authority, and prestige. . ."

We think Friedson's observations capture some of the most salient characteristics shared by the occupations affected by this application. The evidence clearly demonstrates that all the occupations are organized around the medical profession, and despite the ethical stance taken by some of the witnesses, we are satisfied that all the occupations are subordinate to that profession. They perform their work at the request of a doctor and the work to a greater or lesser extent is monitored by a doctor. . . The Board is also satisfied that all occupations are integrally related to the treatment process and while there may not be significant direct contact between all the occupations in the two groupings proposed by AAHP, all of the occupations sought to be represented by AAHP rely upon information and analysis provided by many of the other occupations and must be fully familiar with the significance of their activities. Therefore, in this sense there exists a functional interdependence between the activities of the two groups of occupations.

These common characteristics aside, the Board's aversion to fragmentation or preference for a more comprehensive bargaining unit cannot be ignored. . . in the case at hand we have found that we are confronted by two otherwise appropriate bargaining units but rather we view the fragmentation proposed by AAHP as another indication of inappropriateness. (See *Corporation of the Township of Markham* [1969] OLRB Report August 592).

15. In *Hôpital Montfort Supra*, the classifications of persons objecting to inclusion in the unit with "technical" paramedical employees were the pharmacists, physiotherapists, dieticians, social workers and psychologists, representing basically the group being referred to as "professionals" in *Stratford General, supra*. The Board concluded:

30. In *Stratford General Hospital* the Board gave full consideration to the arguments and views of all the groups before it including paramedical employees employed in a professional capacity. The Board not only concluded that one comprehensive unit was appropriate but expressed the opinion that the smaller unit of professionals would be inappropriate in view of the fragmentation it would cause. It would follow on the same reasoning that in this case a smaller unit of paramedicals employed in a technical capacity [i.e., minus the professionals] would similarly cause undue fragmentation. In *Windsor Western Hospital Centre Inc.*, [1979] OLRB Rep. May 463 the Board endorsed the conclusion in *Stratford General Hospital* that one comprehensive unit was appropriate. The Board in *Windsor Western Hospital* reached this conclusion notwithstanding the fact that it had stronger evidence on the question of

professionalism from the objecting psychologists and psychometrists than was apparently before the Board in *Stratford General Hospital*.

31. Consistent with its decision in *Stratford General Hospital* and *Windsor Western Hospital*, the Board concludes in this case that the comprehensive paramedical unit applied for by the applicant union is the unit appropriate for collective bargaining. The Board therefore dismisses the claim of the objecting employees that they be carved out of the unit applied for by the applicant union.

16. The present case attempts to strain the Board's policy even further. Here the pharmacists are asking for exclusion from what (through previous fragmentation of the paramedical group) has already evolved into a unit composed solely of "professionals", being the occupational therapists, pharmacists, psychologists and psychometrists, social workers, speech pathologists and audiologists, and physiotherapists employed by the respondent Hospital. (Cf. again the list of "professionals" seeking exclusion in *Hôpital Montford, supra.*) The Board can see nothing in the case before it which would cause it to grant this exclusion.

17. The Board accordingly finds that:

- (1) all paramedical employees of the respondent in the Municipality of Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, persons regularly employed for not more than twenty-four (24) hours per week, students employed during the school or university vacation period, persons covered by subsisting collective agreements, and persons covered under bargaining rights held by The Association of Allied Health Professionals (unit #1); and
- (2) all paramedical employees of the respondent in the Municipality of Metropolitan Toronto regularly employed for not more than twenty-four (24) hours per week and students employed during the school or university vacation period, period, save and except supervisors, persons above the rank of supervisor, persons covered by subsisting collective agreements and persons covered under bargaining rights held by The Association of Allied Health Professionals (unit #2),

constitute units of employees of the respondent appropriate for collective bargaining.

18. For the purpose of clarity, the Board notes the agreement of the parties that:

1. Students employed under a co-operative training program are not included in either bargaining unit.
2. The term "paramedical employees" includes Occupational Therapists, Pharmacists, Psychologists and Psychometrists, Social Workers, Speech Pathologists and Audiologists, and Physiotherapists.

3. The term "supervisor" includes Chief Social Worker, Food Service Manager, Chief Psychologist, Supervisor of Physiotherapy, Supervisor of Occupational Therapy, Co-ordinator of Rehabilitational Medicine, Assistant Chief Pharmacist, Director of Crisis Intervention Unit and Dieticians.

19. The Board is satisfied on the basis of all the evidence before it that more than fifty-five per cent of the employees of the respondent in bargaining unit #1 at the time the application was made were members of the applicant on October 15, 1981, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

20. A certificate will issue to the applicant with respect to bargaining unit #1.

21. The Board is satisfied on the basis of all the evidence before it that less than forty-five per cent of the employees of the respondent in bargaining unit #2 at the time the application was made were members of the applicant on October 15, 1981, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

22. The application with respect to bargaining unit #2 is therefore dismissed.

2323-80-M International Union of Operating Engineers, Local 793, Applicant, v. Traugott Construction Limited, Respondent.

Collective Agreement - Construction Industry Grievance - Employer signing agreement in face of unlawful strike - Challenging arbitrability of grievance - Whether employer estopped from challenging validity of agreement - Whether Board declaring agreement void - Whether refusing to enforce it

BEFORE: D. E. Franks, Vice-Chairman, and Board Members W. H. Wightman and W. F. Rutherford.

APPEARANCES: *S.B.D. Wahl, E.A. Ford and G. Steers for the applicant; Paula M. Rusak and Jim Schwindt for the respondent.*

DECISION OF VICE-CHAIRMAN D. E. FRANKS, AND BOARD MEMBER W. H. WIGHTMAN; November 27, 1981

1. This is a referral of a grievance to arbitration under section 124 of the *Labour Relations Act*. The subject matter of the grievance alleges the violation of an alleged collective agreement between the applicant and the respondent on a job in Picton. However, the

respondent employer in this matter has challenged the arbitrability of the grievance by way of a preliminary objection to these proceedings. The respondent employer objects to these proceedings on a number of grounds and the Board heard the evidence and representations of the parties on the matter of the arbitrability of this grievance.

2. The respondent employer in this matter, Traugott Construction Limited, (hereinafter referred to as Traugott), is a general contractor whose base of operations is the Kitchener area. The events through which the respondent challenges the arbitrability of this grievance occurred during the spring of 1980. At that time the respondent had four jobs, in what is roughly the Toronto area or in Board certification terms, Board Area 8. On some of these jobs Traugott was acting as a construction manager and on other jobs Traugott was acting as a general contractor. The events questioned, however, seem to be limited to one site only, that is the construction of a K-Mart and Loblaws Store in the Newmarket area. On the Newmarket job Traugott was acting as both construction manager and as a general contractor in that although most of the contracts were let over the signature of the purchaser of the construction, Traugott also had employees on the job. On Monday morning, March 18th a picket line appeared on the Newmarket site. There were three or four men on this picket line carrying signs which said "non union labour on this job" and "unfair contractor". There was nothing on the signs to identify who the picketers were or on whose behalf they were picketing, and the evidence of Mr. Schwindt, the general manager of Traugott, is that when he tried to speak to the picketers there was no communication with them. At this time there were about 40 to 50 construction workers on the job site. The effect of the picket line was to shut the project down. Some crossed the picket line but did not work, others didn't cross the line. In any event it is clear that a project with a fixed deadline came to a halt on March 18th.

3. The evidence of Mr. Schwindt is that in view of the picket line his first action was to call his head office in Kitchener. His second action was to phone the Toronto Central Ontario Building and Construction Trades Council (hereinafter referred to as the Building Trades Council). His evidence is that he spoke to a Mr. Michael Lloyd concerning the picket line. His evidence was that Lloyd's reply was that he didn't know who was picketing or why, but that he would use his offices to attempt to find out what the problem was. Apparently, Schwindt made an appointment to see Lloyd on March 20th. The work stoppage continued throughout the 18th and the 19th and the 20th. On the 20th, as arranged, Schwindt went to the offices of the Building Trades Council to meet with Lloyd.

4. At the start of the meeting he asked Lloyd if he had found out anything concerning the picket. Lloyd's reply was that he said he didn't know who was picketing, however, he had found out that there was a non-union steel erecting contractor and a non-union plumbing contractor on the Newmarket project. Schwindt advised Lloyd that these were matters out of his control, that basically the owner had subcontracted the steel and in any event there was nothing that could be done about it at this point because the structural work was virtually completed. Schwindt was however surprised about the plumbing contractor since he was under the impression that the plumbing contractor was a union contractor. As a consequence, Schwindt phoned the plumbing contractor, a company called Dalton Mechanical, and then turned the phone over to Mr. Lloyd. It appears that some reference was made to another firm called Urban Mechanical 1979, however, the evidence of Schwindt was quite clear that all of the invoicing on the job was done to Dalton Mechanical and that the people on the job never changed as a consequence of the telephone conversation.

5. Things however did change on the job. Mr. Lloyd indicated that he was satisfied. Mr. Schwindt's evidence was that if Lloyd was satisfied he was satisfied. Work resumed later that day.

6. Normal operations continued until the 12th of May. That also was a Monday. On that morning three or four workmen appeared carrying picket signs, as a consequence of which the Newmarket job was again closed down. Mr. Schwindt had been warned by the electrical contractor on Friday that there was going to be trouble on the Monday morning. As a consequence, when he came to the job site on Monday morning he was armed with a camera in order to take pictures of the events. There was, however, one major difference between the events of May 12th and the earlier events in March. On this occasion there were about a dozen "gentlemen" dressed in business suits off the site around the perimeter of the job. Mr. Schwindt's evidence is that he went over to these gentlemen and attempted to talk to the gentleman he described as their "ring leader". He identified him as "ring leader" because he had been going from group to group. This person, Mr. Schwindt later came to realize was Mr. Dave Johnson, the business manager of the Building Trades Council. He asked Johnson what was going on and was told that Traugott had better clean up its act or "he would shut us down". At this time Schwindt also talked to a number of employees and was told by the employees that they had been told by their respective business agents not to report to work.

7. As mentioned earlier, Schwindt had been warned on Friday that there would be trouble on the job on Monday. As a consequence of that information, he had telephoned Mike Lloyd on Friday afternoon. Lloyd had set up a meeting between Schwindt and Johnson on Monday morning at 10:00 a.m. in the Building Trades offices. Schwindt left the Newmarket job site and drove to the Building Trades offices where he met Mr. Johnson for the second time that morning. They retired to the council's board room where Johnson informed him that he was aware of all four of Traugott's jobs in the Toronto area and he would picket them all unless Traugott signed the working agreement (we shall discuss this document in detail later in this decision). Schwindt explained to Johnson that he didn't have the authority to sign such a document without consulting others, and arranged to meet again later that day. Schwindt went to Kitchener and met with various officers of Traugott. Later in the day he and the corporate secretary, Mr. Yatze, returned to the offices of the Building Trades Council.

8. In the afternoon meeting it is clear that Johnson went over the terms of the working agreement with both Schwindt and Yatze. It appears that Johnson would not allow any variation of the terms of the agreement, however, he was prepared to allow for exemptions for current non-union contractors working on current jobs. After some discussion it was agreed that Traugott would sign the agreement. It was however not signed that afternoon. Subsequently, an appendix was prepared and sent to Traugott, together with the agreement. The evidence is that Traugott attempted to alter some of the terms. This was sent back to Johnson which brought a follow-up call which reiterated that he couldn't allow changes and a new copy was sent to Traugott, it was signed and sent back. At this point Schwindt denies that Traugott ever received a copy of the agreement signed by the council. However, the evidence of Mr. Johnson is that such would have been sent in the normal course of events and we are prepared to accept the evidence of Mr. Johnson in this regard.

9. As a consequence, from the 13th of May on, work continued on the various Traugott jobs without incident.

10. The working agreement signed by Traugott is as follows:

THIS COLLECTIVE AGREEMENT made as of the 23rd day of May, 1980.

BETWEEN: TRAUGOTT CONSTRUCTION LIMITED,
9 Centennial Drive,
Kitchener, Ontario.
N2B 3E9

(hereinafter referred to as "the Company")

—and—

TORONTO-CENTRAL ONTARIO BUILDING
AND CONSTRUCTION TRADES COUNCIL

(hereinafter referred to as "the Council")

The Company and the Council, on its own behalf and on behalf of its affiliated local unions (the "Affiliated Unions") agree each with the other as follows:

1. The general purpose of this collective agreement is to establish and maintain satisfactory relations with the Council, the Affiliated Unions and their members, the Company, its employees and any contractors and their employees who may be engaged in construction work at any project or job in which the Company is engaged in all sectors of the Construction Industry, within the geographic area hereinafter set forth; and, to establish and maintain satisfactory working conditions, hours of work, wages and other employee benefits on such projects or jobs.
2. The Company hereby recognizes the Council and the Affiliated Unions as the exclusive bargaining agent for all its construction employees engaged in all sectors of the Construction Industry, in the Counties of Northumberland, Peterborough, Victoria and Simcoe, the Provisional County of Haliburton (and the Geographic Townships of Lawrence and Nightingale), the District Municipality of Muskoka, the Municipality of Metropolitan Toronto, the Regional Municipalities of Durham, York, Peel and that portion of the Regional Municipality of Halton, East of Trafalgar Road (Regional Road No. 3).
3. The Company agrees to:
 - (a) Employ only members in good standing of the Affiliated Unions;
 - (b) Let or sublet contracts only to contractors who are in contractual relationship with the Affiliated Unions;

- (c) Ensure and require that only contractors who are in contractual relationship with the Affiliated Unions shall be let or sublet any contracts or sub-contracts with respect to any of the subject construction work at any project or job in which the Company is engaged within the geographic areas described in Article 2 hereof, regardless of whether the Company has a contractual relationship or otherwise with any contractor or sub-contractor performing any work at such project or job.
- 4. The Company and the Council, on its own behalf and on behalf of the Affiliated Unions agree to:
 - (a) Recognize and be bound by the collective agreements made between or binding upon any of the Affiliated Unions on the one hand, and any employers' organization on the other hand ("the Collective Agreements"); and
 - (b) Without limiting the generality of the foregoing, specifically agree that all provisions relating to wages, hours of work and working conditions set forth in any of the applicable Collective Agreements shall be binding on the Company and the contractors referred to in Article 3 hereof. In the event that any of the terms and conditions of any of the Collective Agreements are altered, amended or renewed at any time during the currency of this collective agreement, the Company and the Affiliated Unions shall be bound by such alterations, amendments or renewals as if original parties thereto. The Collective Agreements are available for inspection by the Company or by the said contractors at the offices of the Council, located at Suite 402, 15 Gervais Drive, Don Mills, Ontario.
- 5.
 - (a) Any failure by the Company or any of the contractors referred to in Article 3 hereto to comply with any of the obligations set forth in this collective agreement and the Collective Agreements referred to in Article 4 hereof, shall entitle the Council and/or its Affiliated Unions to grieve and invoke Section 112a of the *Ontario Labour Relations Act*.
 - (b) In the event that any contractor hereinbefore referred to fails to comply with any of the obligations described in this collective agreement and the Collective Agreements referred to in Article 4 hereof, then in addition to the remedy outlined herein, the Company shall forthwith upon the request of the Council terminate or secure the termination of any contract or sub-contract with the said contractor and thereafter, ensure and require that the said work be performed with members of the Affiliated Unions or that another contractor be engaged to perform the said work in accordance with the provisions of Article 3 hereto.

6. This collective agreement shall remain in force for a period of one (1) year from the date hereof and shall continue in force from year to year thereafter unless either party shall furnish the other with written notice of termination of or proposed revision of this collective agreement not less than sixty (60) days before the date of its termination or in any like period in any year thereafter; provided, however, that this collective agreement shall remain in full force and effect until completion of all jobs and projects that have been commenced during the operation of this collective agreement.

7. This collective agreement shall be binding upon the Company, its successors, assigns, substitutes and associated or related entities.

IN WITNESS WHEREOF the parties hereto have caused this collective agreement to be executed by their duly authorized representatives in that behalf as of the date and year first above written.

FOR THE COMPANY: FOR THE COUNCIL:

(Signed) Arthur Traugott, President	(Signed) James "Dave" Johnson Business Manager
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(Signed) J. M. Schwindt General Manager	(Signed) J. Tressider Business Representative
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ADDENDUM TO AGREEMENT

BETWEEN: TRAUGOTT CONSTRUCTION LIMITED

—and—

TORONTO-CENTRAL ONTARIO BUILDING
AND CONSTRUCTION TRADES COUNCIL

The Council agrees to exclude from the terms and conditions of the agreement herein referred to, the sub-contractors listed in Schedule "A" for work on their respective projects, understanding, however, that all other work performed on said projects must meet with the terms and conditions of the Collective Agreement entered into between Traugott Construction Limited and the Toronto-Central Ontario Building and Construction Trades Council.

SIGNED ON BEHALF THE COMPANY	SIGNED ON BEHALF OF THE COUNCIL
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(Signed) Arthur Traugott President	(Signed) James "Dave" Johnson Business Manager
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(Signed) J. M. Schwindt General Manager	(Signed) Michael E. Lloyd Business Representative
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Date: May 23, 1980

SCHEDULE "A"

PROJECT: Zehrs Store and Plaza

LOCATION: Highway 47 south of Uxbridge, Ontario

SUB-CONTRACTORS: Cooksville Steel (Ed Belder)
 Schwartz Roofing
 Metcon - Misc. Iron
 County Mechanical - H.V.A.C.
 Musselman Plumbing

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PROJECT: Syndicated Developments

LOCATION: South east corner of Davis Drive
 and Yonge Street, Newmarket, Ontario.

SUB-CONTRACTORS: Cooksville Steel (Ed Belder)
 Metcon - Misc. Iron
 Brantco Asphalt Paving & Concrete - Curbs
 Landscaping

.....

PROJECT: Gateway Shopping Mall

LOCATION: Collingwood, Ontario.

SUB-CONTRACTORS: Cooksville Steel (Ed Belder)
 Kitchener Forging - Misc. Iron
 Smith Peat Roofing
 Collingwood Glass
 Barrie Plastering
 Reidel Painting
 Anderson & Hiltz - Paving
 County Mechanical Plumbing & H.V.A.C.

Date: May 23, 1980

11. It should be noted that at the time in question on the Newmarket job, Traugott apparently employed a number of carpenters and labourers and these carpenters and labourers were supplied by and worked pursuant to, apparently, a collective agreement with the Kitchener locals of the carpenters and labourers unions, these being the locals with which Traugott had a collective bargaining relationship through the Grand Valley Construction Association. On the other hand from the evidence of Dave Johnson it is clear that the Building

Trades Council did not attempt to sign up of the employees of either Traugott or the subcontractors in March, April or May, 1980. Indeed, the evidence of Johnson was to the effect that picketing such as described above was the common practice in order to obtain an employer's signature on the working agreement, and indeed, Johnson's answer in response to the question as to which trades were actually picketing the job, was simply that the carpenters and ironworkers were picketing the job.

12. The above events took place on the 12th and 13th of May. The document resulting from these events is dated May 23, 1980. As a consequence of Traugott signing the working agreement, the minutes of the meeting of the Building Trades Council which took place on June 9, 1980, indicate that "Traugott Construction Kitchener" had signed the "overall agreement". Further, it is the practice of the Building Trades Council to publish a list of firms which have signed overall working agreements with the Council and in a list dated September 30, 1980, Traugott Construction appears as one of the companies that is signatory to that agreement. This list is updated regularly and is distributed to the affiliates of the Council and various contractors.

13. On the attached Schedule "A" appended to the working agreement, one of the projects listed is the Gateway Shopping Mall located in Collingwood, Ontario. With regard to that project one of the exempted subcontracts is Barrie Plastering. The evidence of Mr. Schwindt is that some time in June of 1980 he had discussions with Mr. Lloyd of the Building Trades Council concerning this job. It appears that there was some problem as to whether the company performing the contract was Barrie Plastering or Al Smith. As a consequence, however, Schwindt decided that rather than subcontract the work to Barrie Plastering he subcontracted the drywall contract to a firm called Losereit Sales and Service, a company that has a collective agreement with the Carpenters' Union, a company which he knew was in good standing with the Building Trades Council and which would not cause a problem on the Collingwood job site.

14. On the foregoing facts the respondent requested the Board to find that there is no collective agreement between the applicant trade union and the respondent. The respondent argues first, that the document was never executed. However, as noted above, we find that as a matter of fact the document was executed by both Traugott and the Building Trades Council. Similarly, the respondent argued that when the document was signed there were certain misrepresentations made concerning the document itself by the Building Trades Council. Again, as a matter of the evidence before the Board we are of the view that there were no such misrepresentations made by either Mr. Johnson or anyone from the Building Trades Council concerning the effect of that document. However, of more concern are the two other arguments put forth by counsel for the respondent, namely, that there was no collective agreement because (a) the document was signed under duress or (b) because at the time of signing there were no employees, i.e. operating engineers in the bargaining unit giving rise to the grievance in the present case.

15. Turning first to the argument of the respondent that the working agreement was signed under "duress" or "economic duress", it is clear on the evidence that the effect of the work stoppages both in March and in May put a substantial amount of economic pressure on Traugott. The evidence in this regard was clear that Traugott itself had outstanding money in the four projects involved. Further, the Newmarket job was a particularly vulnerable job because it had a fixed completion date and was being performed for people who were "good

customers of Traugott". The respondent thus argues that when work stopped Traugott had little or no choice but to sign whatever piece of paper it was necessary to sign in order to get the job back to work. In this regard, the respondent argues that the Board ought to render void an agreement signed under this kind of pressure.

16. First it should be noted that the legal definition of "duress" which is sufficient to void a contractual obligation has always been limited by the courts to the fear of physical harm to either oneself or to one's family. In the present case, therefore, since there is no threat or apprehension of any physical violence there is no duress under the Common Law.

17. The respondent, however, urged the Board to adopt a theory of "economic duress" arguing that in effect the harm caused by the disproportionate financial losses which Traugott stood to suffer from the strike constitutes a form of duress sufficient to void the contract. In the context of the *Labour Relations Act* we are not prepared to develop a theory of economic duress as suggested by the respondent. Clearly, the *Labour Relations Act* by its very nature deals with activity causing "economic duress". To develop a theory of "economic duress" would involve an evaluation of the economic effect of certain types of conduct. This we are not prepared to do in the present case.

18. In effect the *Labour Relations Act* deals with economic activity as either lawful or unlawful collective action. Thus, in the context of the *Labour Relations Act*, the respondents argument concerning "economic duress" becomes one of the effects of unlawful activity on the signing of the working agreement. Indeed, the respondent also framed its argument in terms of alleged violations of the *Labour Relations Act*. That is, that the Board should declare void a collective agreement or recognition document signed as a consequence of a violation of the *Labour Relations Act*, in particular sections 74 and 76. These sections read as follows:

"74. No trade union or council of trade unions shall call or authorize or threaten to call or authorize an unlawful strike and no officer, official or agent of a trade union or council of trade unions shall counsel, procure, support or encourage an unlawful strike or threaten an unlawful strike."

"76.-(1) No person shall do any act if he knows or ought to know that, as a probable and reasonable consequence of the act, another person or persons will engage in an unlawful strike or an unlawful lock-out.

(2) Subsection (1) does not apply to any act done in connection with a lawful strike or lawful lock-out."

In view of the facts recounted above, was there a violation of either or both section 74 or section 76?

19. On the facts in this matter it is clear that in setting up the picket line which ultimately led to the working agreement, the Building Trades Council through Mr. Johnson violated both section 74 and section 76 of the Act. The picketing and strike at the Newmarket job site commenced on the morning of May 12th. Counsel for the applicant submitted a "No Board Report" from the Minister of Labour dated May 9, 1980. Since it is clear on the evidence that Traugott had a bargaining relationship with the Carpenters Union through its membership in the Grand Valley Construction Association there is no possible way that the strike of the

carpenters, when they refused to work on May 12th, could have been within the time limits for a lawful strike set out in section 72 of the Act. It is therefore clear that the carpenters employed by Traugott were on an unlawful strike as of May 12th. It therefore follows that Mr. Johnson, on behalf of the Building Trades Council, “counselled, procured, supported or encouraged an unlawful strike” on that Monday morning. Further, there was also a violation of section 76 in that he new or ought to know that a reasonable consequence of his act that morning would be that the carpenters employed by Traugott would engage in an unlawful strike. In fact, Johnson’s intent was quite clear. He intended to “close down Traugott’s jobs” until Traugott signed the working agreement. There is, thus, no question on the evidence that Johnson set out on a course which included the violation of section 74 and 76 in order to obtain Traugott’s signature on the working agreement.

20. In fact, it is clear that Johnson intended to go outside of the orderly processes of the *Labour Relations Act* and through a strike which was unlawful, obtain adherence to the Building Trades Council working agreement. In such circumstances, the questions which arise are, can the Board remedy the consequences of such unlawful conduct? Further, if the Board can remedy such conduct, what is the appropriate remedy which the Board can issue? Counsel for the respondent employer could cite no case in which the Board had struck down a collective agreement made as a consequence of a recognition strike. Nor could the Board find such a case.

21. The present case is a referral of a grievance under section 124 of the *Labour Relations Act*. As such the Board sits as an Arbitration Board to hear and to adjudicate upon grievances under a collective agreement. Counsel for the applicant takes the position that the Board can only act as an Arbitration Board and exercise the powers which exist in such Arbitration Boards. We cannot accept such a narrow construction of the Board’s powers in these circumstances. Indeed, the Board has in numerous section 124 cases, applied other powers and other provisions of the *Labour Relations Act*, for example, section 1(4) and section 63. (For a discussion of this point, applying still the provisions of the *Labour Relations Act*, see *J. G. Rivard Limited* [1980] OLRB Rep. July, 1009.)

22. In any event, we are not convinced that even if we were limited to those powers exercised by a Board of Arbitration under a collective agreement as required by section 44 of the Act, that the result would be different in the present case. It would be open to such a tribunal to decide whether a grievance is arbitrable by just determining if there is a valid collective agreement in existence between the parties. (See *Carpenters District Council of Toronto and Vicinity and Engineering Structures and Components Limited*, (1978), 19 O.R. (2d) 445; 85 DLR (3d) 443 (Div. Ct.).)

23. What then is the appropriate remedy to apply in a situation where a collective agreement or recognition agreement arises as a consequence of unlawful conduct? Counsel for the respondent has asked the Board to render the agreement void. That is, that the Board should declare that the working agreement between Traugott and the Building Trades Council, having been signed as a consequence of a violation of the Act should be declared void and hence unenforceable. While it may be that the Board could in an application under section 89 of the Act develop such a remedy, we are of the view that we cannot go that far in the present case. Indeed, we note that such a proceeding under section 89 would directly involve the Building Trades Council as a party whereas in the present referral under section 124 the Building Trades Council is not a party. We are therefore of the view that in the course of these

proceedings, this Board cannot declare the working agreement void. We can only, in the circumstances of the present case, decline to give effect to the working agreement. That is, find that there is no collective bargaining relationship between the applicant and the respondent, such as would entitle the Board to hear the referral of a grievance under section 124 of the Act.

24. Counsel for the applicant argued that the respondent, having signed the working agreement, could not subsequently challenge its validity. He argued that where the respondent was faced with a work stoppage the appropriate remedy for such a work stoppage is section 135 of the Act. Counsel thus argued that the respondent made a distinct choice at the time of the work stoppage. The respondent could have brought a section 135 complaint to direct that the picketing cease, however, the respondent, for whatever reasons, having chosen not to do that but rather to sign the working agreement was now estopped from questioning the validity of that working agreement. We cannot agree with this argument by counsel for the applicant. If signing the working agreement ends what is patently an illegal work stoppage, then the conduct of the respondent is simply mitigating as much as possible the consequences of the illegal activity of the picketers. We see no reason why the respondent should be required to undergo the delays inherent in an adjudication directing the picketers to cease their illegal conduct.

25. All that remains in the present case is to decide whether in the circumstances of this case, the Board should refuse to recognize the fruits of the working agreement obtained through unlawful conduct? Clearly, the respondent did not complain after the agreement was signed but proceeded to finish the various jobs which it had going in the Toronto area at that time. In view of the pattern of two work stoppages prior to the signing of the working agreement, such a reaction by the respondent is clearly understandable. All the respondent did was wait until the present applicant attempted to rely on the working agreement as a valid document, and then the respondent raised the issue of its illegality.

26. Further, in the circumstances of the present case, it is not open to the applicant to argue that the respondent accepted the working agreement as valid. The applicant did not and cannot show that the conduct of Traugott was such that the Building Trades Council or its affiliated members could reasonably believe that Traugott accepted the working agreement. The appendix to the working agreement set out in paragraph 10 above makes certain exemptions to its application. Given such extensive exemptions, the working agreement had no effect on Traugott's conduct until the jobs listed therein were completed. Simply put, it would be impossible for anyone to tell whether or not Traugott was either complying with the working agreement or was refusing to comply with the working agreement on the basis of Traugott's conduct on those jobs. It was not until the job which gives rise to the present grievance commenced, that the effect of the working agreement was called into question. Indeed, Traugott's reaction to a call from the Building Trades Council concerning the Collingwood job site, (see paragraph 13 above) is consistent with the view that Traugott was not going to antagonize the Building Trades Council until the jobs purportedly affected by the working agreement were finished. In these circumstances, therefore, it is not open to the applicant to say that either the Building Trades Council or its affiliates relied upon the conduct of Traugott, subsequent to the signing of the working agreement, as showing that Traugott did not contest the validity of the working agreement. We wish to emphasize, however, that had Traugott performed a positive act to indicate that it had accepted the working agreement, the result in the present case would have been different. Thus, had Traugott accepted the terms of the working agreement, it could not later deny such an acceptance. In the present case, however, there was no evidence of such a positive act of acceptance.

27. For the foregoing reasons, we find that the working agreement executed by Traugott with the Building Trades Council does not give the applicant any bargaining rights for employees of Traugott because it was signed as a consequence of the unlawful conduct of the Building Trades Council. That being the case, there is no document upon which the applicant can rely to establish that it has bargaining rights for the employees of Traugott. For those reasons, the present application is dismissed.

28. In view of the foregoing result, it is not necessary for us to deal with the second argument raised by counsel for the respondent concerning the effect of recognition of employees at a time when it is alleged that there are no employees in a bargaining unit.

DECISION OF BOARD MEMBER W. F. RUTHERFORD;

1. In May, 1980 Traugott signed the working agreement with the Toronto Central Ontario Building and Construction Trades Council. In June, 1980 Traugott changed to a Plastering Sub-Contractor known to be a contractor recognized by the council, thereby leaving the impression to the Building Trades Council and its affiliates that Traugott had accepted the working agreement with the exemptions negotiated between the two parties.

2. Traugott should not be allowed to now plead he signed under duress months later when he did not charge the Building Trades Council of wrong doing until a grievance was submitted on the Piction job. I would have allowed the grievance to proceed to arbitration.

0457-81-M Kevin James McGrath, Applicant, v. United Steelworkers of America, Local 8533, Respondent, v. Umex Corp. Ltd., Respondent

Religious Exemption – Application clearly untimely – Applicant claiming that provision of Act “unfair and discriminatory” – Relying on *Ontario Human Rights Code* – Whether Board dismissing without hearing

BEFORE: George W. Adams, Chairman, and Board Members O. Hodges and J. D. Bell.

DECISION OF THE BOARD; November 5, 1981

1. By application dated May 12, 1981, the applicant sought exemption under section 47 of the *Labour Relations Act*, from the union security provisions of a collective agreement entered into by his union and his employer, Umex Inc.

2. The respondent union filed its reply on June 17, 1981, reserving its right to file a supplementary reply after further review. The Registrar of the Board, in accordance with usual practice, scheduled the matter for hearing on July 23, 1981.

3. Subsequently, by letter dated July 14, 1981, the union filed a supplementary reply, in which it took the position, *inter alia*, that the application was untimely and that therefore it

did not make a *prima facie* case. It was submitted that the application should be dismissed without a hearing pursuant to section 46(1) of the Board's Rules of Procedure.

4. Unfortunately, the Registrar was unable to contact the applicant in order to put him on notice of the union's position and to provide him with an opportunity to respond and his employer was unable to indicate his whereabouts, other than that he was on vacation.

5. On July 23, 1981, the applicant appeared at the Board's offices unaware of the union's position and requested that he be permitted time to submit written representations, which he wished the Board to take into account in deciding whether to invoke Rule 46(1). His request was granted.

6. The applicant filed his written representations by letter dated October 10, 1981 and the union responded by letter dated October 27, 1981.

7. It is common ground that the union security clause from which the applicant seeks exemption is contained in a collective agreement entered into by the respondent union and the applicant's employer, Umex Inc., on March 15, 1981. The clause requires the employer to deduct from the first pay each month of every employee in the bargaining unit, an amount equivalent to regular union dues and to remit such amounts to the union. The clause had been first negotiated by the parties in a collective agreement entered into on January 7, 1977. It had been carried over upon the renewal of the collective agreement on March 15, 1979.

8. Section 47 of the *Labour Relations Act* provides as follows:

"47-(1) Where the Board is satisfied that an employee because of his religious conviction or belief,

(a) objects to joining a trade union; or

(b) objects to the paying of dues or other assessments to a trade union,

the Board may order that the provisions of a collective agreement of the type mentioned in clause 46(1)(a) do not apply to such employee and that the employee is not required to join the trade union, to be or continue to be a member of the trade union, or to pay any dues, fees or assessments to the trade union, provided that amounts equal to any initiation fees, dues or other assessments are paid by the employee to or are remitted by the employer to a charitable organization mutually agreed upon by the employee and the trade union, but if the employee and the trade union fail to so agree then to such charitable organization registered as a charitable organization in Canada under Part I of the *Income Tax Act* (Canada) as may be designated by the Board.

(2) *Subsection (1) applies to employees in the employ of an employer at the time a collective agreement containing a provision of the kind mentioned in subsection (1) is first entered into with that employer and only during the life of such collective agreement, and does not apply to*

employees whose employment commences after the entering into the collective agreement.”

(emphasis added)

9. The emphasized words in section 47(2) make it clear that the exemption is available only to an employee who was in the employ of the employer at the time the collective agreement containing the union security clause was entered into.

10. The applicant commenced his employment with the employer on July 11, 1979. That is, subsequent to the date the collective agreement was first entered into (January 7, 1977), and even subsequent to the entering into of the renewed collective agreement (March 15, 1979).

11. Therefore, it is clear on the face of the application that it is untimely. See: *Shaw Bakery Company Limited*, [1981] OLRB Rep. May 579.

12. Section 46 of the Board's Rules of Procedure provides as follows:

“46-(1) Where an application or complaint does not, in the opinion of the Board, make out a *prima facie* case for the remedy requested, the Board may dismiss the application or complaint without a hearing and it shall in its decision stated the reason for the dismissal.

(2) The applicant or complainant may within ten days after he is served with the decision of the Board under subsection 1 request the Board to review its decision.

(3) A request for review under this section shall contain a concise statement of the facts and reasons upon which the applicant relies.

(4) Upon a request for review being filed, the Board may,

(a) direct that the application or complaint be re-opened and proceeded with by the Board in accordance with the provisions applicable thereto;

(b) direct the registrar to serve the applicant and any other person who in the opinion of the Board may be affected by the application or complaint with a notice of hearing to show cause why the application or complaint should be re-opened; or

(c) confirm its decision dismissing the application or complaint.”

It is under section 46(1) of the Rules that the union requests that this application be dismissed without a hearing.

13. We turn now to the written submissions of the applicant filed in response to the union's request for dismissal without a hearing. The applicant does not deny that the

application is untimely on the clear wording of section 47(2) of the Act. However, he has made two submissions relating to the provision.

14. First, he contended that to restrict the exemption only to employees who were already in the employ of the employer at the time the collective agreement containing the union security clause was first entered into, is "unfair and discriminatory". Unfortunately, the fact remains that the applicant is faced with a legislative provision, the meaning of which is clear and unequivocal. The applicant's — (or for that matter the Board's) opinion as to the desirability or merits of such a provision obviously cannot influence its clear meaning.

15. Secondly, the applicant relied on section 4 and 5 of *The Ontario Human Rights Code*, R.S.O. 1980, c. 340. Section 4 reads as follows:

"4(1) No person shall,

- (g) discriminate against any employee with regard to any term or condition of employment, because of race, creed, colour, age, sex, marital status, nationality, ancestry, or place of origin of such person or employee."

Section 5 prohibits trade unions against exclusion, expulsion or suspension of any person from union membership and against discrimination against any person or member because of any of the prohibited grounds of discrimination as in section 4 above.

16. If the applicant's contention is that section 47(2) of the *Labour Relations Act* is either void or unenforceable because it is in conflict with *The Ontario Human Rights Code*, we see no basis for this contention. The provisions of the Code relied upon prohibit discrimination against a person because of, *inter alia*, his "creed". We fail to see how section 47(2) conflicts with this prohibition. In any event, even if this was the case, the applicant's contention still must fail since the Code does not have primacy over the *Labour Relations Act*, and cannot affect its interpretation or enforcement.

17. For the foregoing reasons, the Board is of the opinion that this application is clearly untimely. The application fails to make out a *prima facie* case and, pursuant to rule 46(1) of the Board's Rules of Procedure, this application is hereby dismissed.

**0470-81-OH Ted Nickarz, Complainant, v. Union Miniere
Explorations and Mining Corporation, Respondent.**

Health and Safety – Whether employee's rights under *Occupational Health and Safety Act* violated – Whether complaint making out a *prima facie* case

BEFORE: M. G. Picher, Vice-Chairman, and Board Members F. W. Murray and W. F. Rutherford.

APPEARANCES: *Ted Nickarz for the complainant; A. D. G. Purdy and C. P. Moore for the respondent.*

DECISION OF THE BOARD; November 13, 1981

1. This is a complaint under section 24 of the *Occupational Health and Safety Act*, R.S.O. 1980 c. 321. The complainant raises some twenty separate instances which he alleges are violations of his rights under the *Occupational Health and Safety Act*. At the hearing counsel for the respondent employer moved that the complaint be dismissed on the basis that the facts alleged, if proved, would not establish any violations of the complainant's rights under the *Occupational Health and Safety Act*.

• • •

3. The facts cited in the material filed by the complainant are extensive. The material filed in support of the complaint includes entries in a diary which the complainant Mr. Nickarz kept from the first day of his employment as a carpenter at the respondent's mine at Pickle Lake. For the purposes of the preliminary motion the Board accepted as proved all of the facts stated in the voluminous materials filed by Mr. Nickarz. The Board then heard from Mr. Nickarz, in a process that extended over a half day of hearing, what it was in each incident which he alleged was in violation of his rights under the Act. This was necessary because it was less than clear to the Board what the connection was between facts alleged and the complainant's rights under the Act. For example one allegation was to the effect that the complainant overheard a union steward and a supervisor arguing about a grievance unrelated to safety. The foreman apparently then stated that he had the authority to discipline and discharge employees. In Mr. Nickarz's view that was a violation of his rights under the *Occupational Health and Safety Act*, because, while it was not addressed to him and did not relate to safety, it was a threat to dismiss a worker, something which he says he believes is prohibited by section 24(1)(a) of the Act.

4. The Board therefore took considerable pains to review in detail with the complainant each and every allegation which Mr. Nickarz intended to advance as disclosing a violation of his rights. Of the twenty separate complaints which he originally filed the complainant relied on fifteen. Of those we can see only two which appear to bear any relationship to his rights under the *Occupational Health and Safety Act*.

5. The first involves his objection to working in an area of the respondent's surface operations known as the transfer house, a dusty and noisy part of the mine operation where

ore received at the surface is broken down. On December 3, 1980 when Mr. Nickarz was assigned to do certain carpentry work in the transfer house he refused to work because of the excessive amount of dust in the air. When he communicated his refusal to his foreman a joint inspection by the health and safety committee of the company and union was immediately conducted. As a result of the inspection the committee imposed several conditions to reduce any risk to Mr. Nickarz. Among other things, the respondent agreed to an arrangement whereby if Nickarz was assigned to work in the transfer house all equipment would be shut down for one hour in advance to allow the dust to settle so that he could work without undue exposure to dust. Mr. Nickarz accepted the conditions, as they apparently answered his concern.

6. Mr. Nickarz alleged that later in the same day his lead hand or foreman made him wait in the carpentry workshop "in a safe place, specifically not near the power tools so I wouldn't hurt myself", and assigned him no work that afternoon, although he was paid in full.

7. Thereafter the grievor worked without significant incident, until December 22, 1980, when he left the company to take a job elsewhere. From the time he left to the filing of this complaint, some five months later, on May 29, 1981, he never communicated to the respondent that he believed it had violated his rights under the *Occupational Health and Safety Act*.

8. On the case that the grievor has pleaded the Board cannot find a *prima facie* case for relief under the *Occupational Health and Safety Act*. In the one instance when the grievor communicated a refusal to work to his employer for reasons of safety an inspection of the work place was conducted. In effect the complainant's protest was sustained by the joint inspection committee. Improved conditions were jointly proposed for future work in the area and were accepted by the complainant.

9. The only remaining issue that could possibly relate to the Act is the allegation that following the inspection a foreman was facetious in his tone in instructing Mr. Nickarz respecting his work assignment. Even if it could be shown that the foreman's attitude was improper and could be taken as a valid form of reprisal against the complainant for having invoked his rights under the Act, it is clear that no substantial harm resulted from that isolated incident. The grievor suffered no discipline or loss of any wages or other employment benefit or opportunity, nor the threat of any of those things. Moreover he did not complain of the foreman's attitude either to his union or to the company directly. Where, as in the instant case, the complaint of such conduct is first brought to the company's attention several months after the event, and where the incident involved is trivial on its face, the Board would not exercise its remedial discretion in favour of the complainant.

10. For the foregoing reasons the preliminary motion that the complaint did not disclose on its face a violation of the Act that would justify any remedial order was sustained and the complaint order was sustained and the complaint was dismissed.

1392-81-R; 1427-81-R United Brotherhood of Carpenters and Joiners of America Local 785, Applicant, v. **Watcon Inc.**, Respondent, v. Group of Employees, Objectors; Labourers' International Union of North America Local 1081, Applicant, v. **Watcon Inc.**, Respondent, v. Group of Employees, Objectors.

Bargaining Unit – Certification – Construction Industry – Applications seeking ICI province-wide unit and non-ICI unit for several areas – Employer having employees only in some areas – Whether applicant restricted to ICI unit – Policy on appropriate areas to be added to ICI unit

BEFORE: Ian Springate, Vice-Chairman, and Board Members W. Gibson and C. A. Ballentine.

APPEARANCES: *In File No. 1392-81-R — Harold F. Caley and Earl Ball for the United Brotherhood of Carpenters and Joiners of America Local 785; Philip J. Wolfenden and Doug Bender for the respondent; Gordon L. Robson for the objectors. No hearing has been held with respect to File No. 1427-81-R.*

DECISION OF THE BOARD; November 19, 1981

1. These proceedings are hereby consolidated.
2. The name of the respondent in both of these matters is amended to read: "Watcon Inc."
3. These matters involve two applications for certification filed pursuant to the construction industry provisions of the *Labour Relations Act*. File No. 1392-81-R came on for hearing on October 23, 1981. The applicant and the respondent in File No. 1427-81-R have both consented to the application being disposed of without a hearing, and it appears to the Board that no useful purpose is likely to be served at this stage of the proceedings by holding a hearing. We propose to deal with the two applications separately, and then to discuss certain matters relevant to both applications.

File No. 1392-81-R

4. The Board finds that United Brotherhood of Carpenters and Joiners of America Local 785 ("Carpenters Local 785") is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act* and is an affiliated bargaining agent of a designated employee bargaining agency. Pursuant to the designation issued by the Minister under section 139(1) of the Act on April 10, 1980, the designated employee bargaining agency is the United Brotherhood of Carpenters and Joiners of America and the Ontario Provincial Council of the United Brotherhood of Carpenters and Joiners of America.

5. The Board further finds that this is an application for certification within the meaning of section 119 of the *Labour Relations Act* and is an application made pursuant to section 144(1) of the Act which provides that:

An application for certification as bargaining agent which relates to

the industrial, commercial and institutional sector of the construction industry referred to in clause 117(e) shall be brought by either,

- (a) an employee bargaining agency; or
- (b) one or more affiliated bargaining agents of the employee bargaining agency, on behalf of all affiliated bargaining agents of the employee bargaining agency and the unit of employees shall include all employees who would be bound by a provincial agreement together with all other employees in at least one appropriate geographic area unless bargaining rights for such geographic area have already been acquired under subsection 3 or by voluntary recognition.

6. On the date of the making of the application the respondent employed carpenters on five industrial, commercial and institutional sector ("ICI sector") projects in the Board's geographic area #6, as well as on one ICI sector project in geographic area #7. At the hearing, the applicant requested that the bargaining unit be described so as to encompass carpenters and carpenters' apprentices employed in the ICI sector in the Province of Ontario as well as those employed in all other sectors in Board areas #6 and #7. The respondent, however, contended that since it employed carpenters only in the ICI sector, the bargaining unit should be restricted to that one sector. As an alternative argument, the respondent submitted that if the bargaining unit was to encompass the non-ICI sectors, it should do so only for Board area #6 in that the respondent is based in, and does most of its work within, that one Board area.

7. Section 144(1), which is set out above, provides that where an application for certification is filed which relates to the ICI sector, the bargaining unit shall include "all employees who would be bound by a provincial agreement" (that is all employees in the ICI sector across Ontario), *together with* "all other employees in at least one geographic area have already been acquired". There are no pre-existing bargaining rights here. On the basis, we are satisfied that the bargaining unit must be described so as to include employees in the non-ICI sectors in at least one geographic area. At the time the application was filed, the respondent employed carpenters in two of the Board geographic areas. The extent of the union's support among all of the Carpenters employed in both geographic areas will determine its right to certification, irregardless of how the non-ICI portion of the bargaining unit is described. In these circumstances, we do not feel it appropriate that carpenters working in either Board area should at some future date fall outside the scope of the bargaining unit simply because they happen to be assigned by the respondent to work in some other sector. Accordingly, we propose to include all sectors in both of the geographic areas within the bargaining unit.

8. Having regard to the above, the Board finds, pursuant to section 144(1) of the Act, that all carpenters and carpenters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all carpenters and carpenters' apprentices in the employ of the respondent in all other sectors in the County of Wellington and in the Regional Municipality of Waterloo except that part of Beverly Township annexed by North Dumfries Township, save and except non-working foremen and persons above the rank of non-working foreman, constitute a unit of employees of the respondent appropriate for collective bargaining.

9. Prior to the terminal date there was filed a statement of desire in opposition to the

application signed by a number of employees, including five who had previously become members of Carpenters Local 785. While the Board was dealing with the issue of the voluntariness of the statement of desire, the group of objecting employees, through their counsel, indicated that they wished to withdraw the statement. In these circumstances, the Board declines to give the statement of desire any weight.

10. The respondent filed a list of employees containing twenty-one names on Schedule "A". Carpenters Local 785 has challenged the accuracy of this list.

File No. 1427-81-R

11. The Board finds that Labourers' International Union of North America Local 1081 ("Labourers Local 1081") is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act* and is an affiliated bargaining agent of a designated employee bargaining agency. Pursuant to the designation issued by the Minister under section 139(1) of the Act on September 6, 1978, the designated employee bargaining agency is The Labourers' International Union of North America and The Labourers' International Union of North America Ontario Provincial District Council.

12. The Board further finds that this is an application for certification within the meaning of section 119 of the *Labour Relations Act* and is an application made pursuant to section 144(1) of the Act.

13. It appears from the filings that on the date of the making of the application the respondent employed construction labourers on four ICI projects in Board area #6 and on one ICI project in Board area #7. Labourers Local 1081 requested that the bargaining unit be described in terms of construction labourers in the employ of the respondent in the ICI sector in the Province of Ontario and those in the employ of the respondent in all other sectors in Board areas 4, 6, 7, 27 and 28. The respondent replied to this request as follows:

The respondent takes the position it only had construction labourers working in board areas 6 and 7 on the date of the application for certification. Therefore, it is the respondent's position that the applicant is only entitled to certification for those two board areas in the sectors apart from the Industrial, Commercial and Institutional sector.

We agree with the respondent's position in this regard, and accordingly will limit the non-ICI portion of the bargaining unit only to Board areas #6 and #7.

14. The Board finds, pursuant to section 144(1) of the Act, that all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all construction labourers in the employ of the respondent in all other sectors in the County of Wellington and in the Regional Municipality of Waterloo except that part of Beverly Township annexed by North Dumfries Township, save and except non-working foremen and persons above the rank of non-working foreman, constitute a unit of employees of the respondent appropriate for collective bargaining.

15. The respondent filed a list of employees containing eight names on Schedule "A"

and one name on Schedule "B". Labourers Local 1081 has challenged the accuracy of this list of employees.

File Nos. 1392-81-R and 1427-81-R

16. As indicated above, the accuracy of both of the lists of employees filed by the respondent has been challenged. Of some interest in this regard is the fact that six individuals who appear on the list of employees in File No. 1392-81-R as carpenters also appear on the list of employees in File No. 1427-81-R as labourers.
No. 1427-81-R as labourers.

17. In File No. 1427-81-R the challenges to the list of employees made by Labourers Local 1081 must be resolved prior to the Board being able to determine the right of that union to certification. As indicated at the hearing held with respect to File No. 1392-81-R, regardless of the outcome of the challenges to the accuracy of the employee list made by the union, Carpenters Local 785 has filed evidence of membership on behalf of more than fifty-five per cent of the individuals listed on Schedule "A". However, subsequent to the hearing, the Board became aware of the fact that an individual listed as a carpenter by the respondent in File No. 1392-81-R, and whose status as a carpenter has not been challenged by Carpenters Local 785, was also listed by the respondent as a labourer in File No. 1427-81-R, and his status as a labourer has apparently not been challenged by Labourers Local 1081. If this individual is in fact a labourer and not a carpenter, and his name is removed from the list of carpenters in File No. 1392-81-R then, depending on the outcome of the union's challenges with respect to the accuracy of the remainder of the respondent's list, the union may not in fact have filed evidence of membership on behalf of more than fifty-five per cent of the employees in the bargaining unit.

18. In these circumstances, the Board is satisfied that the two lists of employees should be finalized prior to proceeding further with these matters, and also that both lists should be dealt with at the same time with both unions in attendance. A Board Officer is accordingly appointed to inquire into, and report back to the Board, on the composition of the two bargaining units and on the lists of employees filed by the respondent with respect to both applications.

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APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR BOARD OCTOBER 1981

BARGAINING AGENTS CERTIFIED

No Vote Conducted

0269-81-R: Ontario Nurses' Association, (Applicant) v. Kirkland and District Hospital, (Respondent) v. Service Employees' Union, Local 478, (Intervener).

Unit: "all registered and graduate nurses employed in a nursing capacity by Kirkland and District Hospital, in Kirkland Lake, Ontario, save and except Head Nurses and persons above the rank of Head Nurse and persons regularly employed for not more than twenty-four hours per week". (59 employees in unit).

1006-81-R: Ready-Mix, Building Supply, Hydro and Construction Drivers, Warehousemen and Helpers Local 230, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. Mississauga Concrete Supply Limited, (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent working in Mississauga, Ontario save and except dispatchers, those above the rank of dispatcher and office and sales staff". (8 employees in unit).

1050-81-R: United Brotherhood of Carpenters and Joiners of America Local 1190, (Applicant) v. Melnik Construction Limited, (Respondent) v. Group of Employees, (Objectors).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman". (4 employees in unit).

1069-81-R: United Cement Lime Gypsum and Allied Workers International Union, (Applicant) v. Alderbrook Industries Limited, (Respondent).

Unit: "all employees of the respondent in Metropolitan Toronto save and except foremen, persons above the rank of foreman, office and sales staff and students employed during the school vacation period". (117 employees in unit). (*Having regard to the agreement of the parties*).

1119-81-R: United Steelworkers of America, (Applicant) v. Hall engineering (Ontario) Limited, (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent in Cambridge, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation periods". (37 employees in unit). (*Having regard to the agreement of the parties*).

1131-81-R: International Union of Operating Engineers, Local 793, (Applicant) v. Rapid Ready-Mix Limited, (Respondent).

Unit: "all employees of the respondent working at and out of Sault Ste. Marie, Ontario, save and except foremen, those above the rank of foreman, office, sales and clerical staff". (10 employees in unit).

1132-81-R: International Union of Operating Engineers, Local 793, (Applicant) v. Rapid Ready-Mix Limited, (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent working at and out of Sowerby, Ontario, save and except foremen, those above the rank of foreman, office and clerical staff". (9 employees in unit).

1179-81-R: Retail, Wholesale and Department Store Union, AFL:CIO:CLC:, (Applicant) v. Anco Food Products Limited, (Respondent).

Unit: "all employees of the respondent at its warehouse operation at Metropolitan Toronto, save and except foremen, persons above the rank of foremen, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period". (12 employees in unit). (*Having regard to the agreement of the parties*).

1197-81-R: Teamsters Local Union No. 419, affiliated with the International Brotherhood of Teamsters, Chaufferus, Warehousemen and Helpers of America, (Applicant) v. Greb Industries, A Division of Warrington Inc., (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent in Mississauga, Ontario, save and except foremen, persons above the rank of foreman, office, clerical and sales staff, and students employed during the school vacation period". (31 employees in unit). (*Having regard to the agreement of the parties*).

1217-81-R: Labourers' International Union of North America, Local 183, (Applicant) v. Coolmur Properties Limited, (Respondent).

Unit: "all construction labourers in the employ of the respondent in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman". (2 employees in unit).

1231-81-R: Christian Labour Association of Canada, (Applicant) v. Ark Eden Nursing Home, (Respondent).

Unit: "all employees of the respondent at Stroud, Ontario, save and except Director of Nursing and persons above the rank of Director of Nursing". (29 employees in unit).

1248-81-R: Laundry and Linen Drivers and Industrial Workers Union, Local 847, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. Allglass Inc., (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent in Markham, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period". (40 employees in unit). (*Having regard to the agreement of the parties*).

1264-81-R: United Rubber, Cork, Linoleum and Plastic Workers of America, AFL-CIO-CLC, (Applicant) v. Diverse Blending Limited, (Respondent).

Unit: "all employees of the respondent in Orillia, Ontario save and except foremen, persons above the rank of foreman, office and sales staff and students employed during the school vacation period". (39 employees in unit). (*Having regard to the agreement of the parties*).

1308-81-R: United Food and Commercial Workers International Union — AFL — CIO — CLC, (Applicant) v. Canadian Cannery Limited, (Respondent).

Unit: "all office and clerical employees of the respondent in Leamington, Ontario, save and except supervisors, persons above the rank of supervisor, plant nurses, secretary to the Office Supervisor and

Area Manager and persons covered by subsisting collective agreements". (8 employees in unit). (*Having regard to the agreement of the parties*).

1314-81-R: International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, (U.A.W.), (Applicant) v. Advanced Wire Die Limited, (Respondent).

Unit: "all employees of the respondent in London, Ontario, save and except foreman, persons above the rank of foreman, quality control analyst, office, technical and sales staff". (14 employees in unit). (*Having regard to the agreement of the parties*).

1319-81-R: International Union of Operating Engineers, Local 793, (Applicant) v. Len Corcoran Excavating Ltd., (Respondent).

Unit: "all employees of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all employees of the respondent in all other sectors in the County of Lennox and Addington, and the County of Frontenac and the Townships of Rear of Leeds and Lansdowne, Rear of Yonge and Escott, and all lands south thereof in the United Counties of Leeds and Grenville, engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman". (2 employees in unit).

1320-81-R: Milk and Bread Drivers, Dairy Employees, Caterers and Allied Employees, Local Union No. 647, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. Weston Bakeries Limited, (Respondent) v. Employee, (Objector).

Unit: "all employees of the respondent working at and out of Espanola, Ontario, save and except supervisors and persons above the rank of supervisor". (3 employees in unit). (*Having regard to the agreement of the parties*).

1327-81-R: United Steelworkers of America, (Applicant) v. SMSP Machine & Steel Products Limited, (Respondent) v. Employee, (Objector).

Unit: "all employees of the respondent in Sault Ste. Marie, save and except foremen, persons above the rank of foreman, office and sales staff, and persons regularly employed for not less than twenty-four hours per week". (12 employees in unit).

1334-81-R: Teamsters, Chauffeurs, Warehousemen and Helpers Local Union No. 880, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. National Grocers Co. Ltd., (Respondent).

Unit: "all employees of the respondent at its cash and carry dept in Windsor, Ontario, save and except assistant manager, persons above the rank of assistant manager, office and sales staff, persons regularly employed for not more than 24 hours per week, students employed during the school vacation period and persons covered by a subsisting collective agreement between the respondent and the applicant". (4 employees in unit). (*Having regard to the agreement of the parties*).

1344-81-R: United Brotherhood of Carpenters and Joiners of America, Local Union 1669, (Applicant) v. R. Badiuk, Contractor, (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector in the construction industry in the Province of Ontario and all carpenters and carpenters' apprentices in the employ of the respondent in all other sectors in the District of Rainy River, save and except non-working foremen and persons above the rank of non-working foreman". (2 employees in unit).

1345-81-R: Labourers' International Union of North America, Local 183, (Applicant) v. Tonon, Tomasi, Cina Construction Group Limited, (Respondent).

Unit: "all carpenters, carpenters' apprentices and construction labourers in the employ of the respondent in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman". (15 employees in unit). (*Having regard to the agreement of the parties*).

1346-81-R: Labourers' International Union of North America, Local 183, (Applicant) v. 441327 Ontario Ltd., (Respondent).

Unit: "all employees of the respondent engaged in cleaning and maintenance at "Goodland Gardens", 75 Eastdale Avenue, Toronto, Ontario, including resident superintendents, save and except property manager, office and clerical staff". (3 employees in unit).

1348-81-R: Bakery, Confectionary & Tobacco Workers' Int'l Union, Local 264, (Applicant) v. Elmira Refiners Ltd., (Respondent).

Unit: "all employees of the respondent at Hamilton, Ontario, save and except foremen, persons above the rank of foreman and office staff". (4 employees in unit). (*Having regard to the agreement of the parties*).

1349-81-R: Bakery, Confectionery and Tobacco Workers' International Union, Local 246, (Applicant).

Unit: "all employees of the respondent of Port Colborne, Ontario, save and except foremen, persons above the rank of foreman and office staff". (3 employees in unit). (*Having regard to the agreement of the parties*).

1351-81-R: International Brotherhood of Painters and Allied Trades — Local Union 1891, (Applicant) v. Blue Sky Painting and Decorating, (Respondent).

Unit: "all painters and painters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all painters and painters' apprentices in the employ of the respondent in all other sectors in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman". (8 employees in unit).

1355-81-R: United Brotherhood of Carpenters and Joiners of America Local Union 2050, (Applicant) v. Thom Construction Ltd., (Respondent) v. Group of Employees, (Objectors).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and carpenters and carpenters' apprentices in the employ of the respondent in all other sectors in the County of Grey, save and except non-working foremen and persons above the rank of non-working foreman". (3 employees in unit).

1362-81-R: The United Brotherhood of Carpenters and Joiners of America, Local Union 3054, (Applicant) v. Huronic Metal Industries Ltd., (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent at its plant in Goderich, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period". (18 employees in unit).

1365-81-R: Teamsters Local Union No. 419, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. Darrigo's Supermarket Ltd., (Respondent) v. Employees, (Objectors).

Unit: "all employees of the respondent working at its warehousing operations in Metropolitan Toronto, save and except supervisors, those above the rank of supervisor, part-time and students employed during the school vacation period". (11 employees in unit).

1369-81-R: Ontario Public Service Employees Union, (Applicant) v. Immigrant Women Job Placement Centre, (Respondent).

Unit: "all employees of the respondent in the Municipality of Metropolitan Toronto, Ontario". (4 employees in unit). (*Having regard to the agreement of the parties*).

1372-81-R: Ontario Nurses' Association, (Applicant) v. The Homewood Sanitarium of Guelph, Ontario Limited, (Respondent).

Unit: "all registered and graduate nurses regularly employed in a nursing capacity by the respondent for not more than 24 hours per week, save and except head nurses and persons above the rank of head nurse". (32 employees in unit). (*Having regard to the agreement of the parties*).

1379-81-R: Ontario Nurses' Association, (Applicant) v. Timmins Nursing Homes Limited, (Respondent).

Unit #1: "all registered and graduate nurses engaged in a nursing capacity employed by the respondent at Timmins, Ontario, save and except director of nursing, persons above the rank of director of nursing and nurses regularly employed for not more than twenty-four (24) hours per week". (3 employees in unit). (*Having regard to the agreement of the parties*).

Unit #2: "all registered and graduate nurses engaged in a nursing capacity, employed by the respondent at Timmins, Ontario, who are regularly employed for not more than twenty-four (24) hours per week, save and except director of nursing and those above the rank of director of nursing". (4 employees in unit). (*Having regard to the agreement of the parties*).

1383-81-R: Fuel, Bus, Limousine, Petroleum Drivers and Allied Employees, Local Union No. 352, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. Natiomas of Canada Ltd., operating under the trade name of DX Oil Company, (Respondent).

Unit: "all employees of the respondent at Whitby, save and except service station personnel, managers, persons above the rank of manager, office and sales staff, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation". (10 employees in unit). (*Having regard to the agreement of the parties*).

1393-81-R: United Plant Guard Workers of America Local 1962, (Applicant) v. Trize Equities Limited, (Respondent).

Unit: "all security guards employed by the respondent at 1 Yorkdale Place, in the City of North York, Metropolitan Toronto, save and except sergeant, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period". (4 employees in unit). (*Having regard to the agreement of the parties*).

1411-81-R: Milk and Bread Drivers, Dairy Employees, Caterers and Allied Employees Local Union No. 647, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. Donland's Dairies Co. Ltd., (Guelph), (Respondent).

Unit: "all office employees of the respondent at Guelph, Ontario save and except office manager, supervisors, those persons above the rank of office manager and supervisor and those persons regularly

employed for not more than twenty-four hours per week". (14 employees in unit). (*Having regard to the agreement of the parties*).

1413-81-R: International Union of Bricklayers & Allied Craftsmen - Local #12 - Kitchener, Ontario, (Applicant) v. Authentic Stone & Brick Products Limited, (Respondent).

Unit: "all employees of the respondent in the city of Cambridge, Ontario, save and except foremen, persons above the rank of foreman, office and clerical staff". (6 employees in unit). (*Having regard to the agreement of the parties*).

1416-81-R: Alliance Employees' Union, (Applicant) v. Union of Solicitor General Employees, P.S.A.C., (Respondent).

Unit: "all employees of the respondent in the City of Ottawa, Ontario save and except the assistant executive secretary, and those above the rank of assistant executive secretary". (4 employees in unit). (*Having regard to the agreement of the parties*).

1423-81-R: Labourers' International Union of North America, Local 183, (Applicant) v. Heron Homes Ltd., (Respondent).

Unit: "all construction labourers in the employ of the respondent in Metropolitan Toronto, the Regional Municipality of York and County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman". (8 employees in unit).

1425-81-R: Canadian Union of Public Employees, (Applicant) v. Canadian Red Cross Society, Ontario Division Emp Red Cross Hospital, (Respondent).

Unit #1: "all employees of the respondent at its hospital in Emp, Ontario, save and except professional medical staff, graduate and undergraduate nurses, paramedical personnel, office and clerical staff, supervisor, persons above the rank of supervisor, persons employed for not more than twenty-four (24) hours per week and students employed during the school vacation period". (14 employees in unit). (*Having regard to the agreement of the parties*).

Unit #2: "all employees of the respondent at its hospital in Emp, Ontario, regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period, save and except professional medical staff, graduate and undergraduate nurses, paramedical personnel, office and clerical staff, supervisors and persons above the rank of supervisor". (10 employees in unit). (*Having regard to the agreement of the parties*).

1444-81-R: Labourers' International Union of North America, Local 527, (Applicant) v. Construction G. Di Iorio Inc., (Respondent).

Unit: "all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all construction labourers in the employ of the respondent in all other sectors in the Regional Municipality of Ottawa-Carleton and the United Counties of Prescott and Russell, save and except non-working foremen and persons above the rank of non-working foreman". (4 employees in unit).

1464-81-R: Teamsters Local Union No. 419, affiliated with the International Brotherhood of Teamsters, Chaufferus, Warehousemen and Helpers of America, (Applicant) v. Brink's Canada Limited, (Respondent).

Unit: "all office and clerical employees of the respondent at its Toronto District Office, in the Municipality of Metropolitan Toronto, save and except secretary to the District Operations Manager (Toronto), Secretary to the District Operations Manager (Ontario), Secretary to the Vice President,

supervisors, persons above the rank of supervisor, persons regularly employed for not more than twenty-four (24) hours per week, and students employed during the school vacation period". (11 employees in unit). (*Having regard to the agreement of the parties*).

1474-81-R: Labourers' International Union of North America, Local 837, (Applicant) v. The Ressel Day Nursery School Inc., (Respondent) v. Employee, (Objector).

Unit: "all employees of the respondent in Burlington, Ontario, save and except supervisors and accountants; persons above the rank of supervisor and accountant; office, clerical and sales staff; persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period". (44 employees in unit). (*Having regard to the agreement of the parties*).

Bargaining Agents Certified Subsequent to a Pre-Hearing Vote

1665-80-R: Employees' Association of Milltronics, (Applicant) v. Milltronics Limited, (Respondent) v. United Electrical, Radio and Machine Workers of America (UE), Intervener).

Unit: "all employees of Milltronics Limited at Peterborough, save and except foremen, persons above the rank of foreman, office and clerical employees, accounting staff, salesmen, professional engineers, product specialists, field service personnel and students". (71 employees in unit).

Number of names of persons on list as originally prepared by employer		93
Number of persons who cast ballots	74	
Number of ballots marked in favour of applicant	36	
Number of ballots marked in favour of intervener	35	
Ballots segregated and not counted	3	

2807-80-R: United Cement, Lime & Gypsum Workers International Union, (Applicant) v. Dominion Paving Limited, (Respondent).

Unit: "all employees of the respondent in Metropolitan Toronto, save and except those engaged in construction work, non-working foremen, persons above the rank of non-working foreman, office and clerical staff and persons regularly employed for not more than twenty-four hours per week". (23 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters' list		18
Number of persons who cast ballots	12	
Number of segregated ballots cast by persons whose name appear on voters' list	10	
Number of segregated ballots cast by persons whose names do not appear on votes' list	2	

0691-81-R: The International Association of Machinists and Aerospace Workers, (Applicant) v. Treco Machine & Tool Ltd., (Respondent).

Unit: "all employees of the respondent in the Municipality of Metropolitan Toronto, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period". (28 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on list as originally prepared by employer		126
Number of persons who cast ballots	120	

Number of spoiled ballots	2
Number of ballots marked in favour of the applicant	64
Number of ballots marked against the applicant	54

1023-81-R: United Steelworkers of America, (Applicant) v. Frankel Steel Limited, (Respondent) v. Shopmen's Local Union No. 834 of the International Association of Bridge, Structural and Ornamental Ironworkers, (Intervener).

Unit: "all employees of the respondent at Milton, Ontario, save and except office or clerical employees, watchmen, guards, foremen and persons above the rank of foreman". (314 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters' list	302
Number of persons who cast ballots	268
Number of ballots marked in favour of applicant	183
Number of ballots marked in favour of intervener	75
Ballots segregated and not counted	10

Bargaining Agents Certified Subsequent to a Post-Hearing Vote

0767-81-R: Canadian Paperworkers Union, (Applicant) v. Lunenburg Industries Ltd., (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent in the Town of Long Sault, save and except foremen, persons above the rank of foreman, office and sales staff, students employed during the school vacation period and persons regularly employed for not more than twenty-four (24) hours per week". (14 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters' list	14
Number of persons who cast ballots	14
Number of ballots marked in favour of applicant	10
Number of ballots marked against applicant	3
Ballots segregated and not counted	1

0840-81-R: United Brotherhood of Carpenters and Joiners of America — Local 1190, (Applicant) v. C.A.S. Carpentry Co., (Respondent) v. Labourers' International Union of North America, Local 183, (Intervener).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman". (8 employees in unit).

Number of names of persons on revised voters' list	11
Number of persons who cast ballots	7
Number of ballots marked in favour of Labourers' International Union of North America, Local 183	1
Number of ballots marked in favour of United Brotherhood of Carpenters and Joiners of America Local 1190	6

0952-81-R: Ontario Public Service Employees Union, (Applicant) v. Ontario College of Art, (Respondent).

Unit: "all employees of the respondent in Metropolitan Toronto save and except Director of Physical Plant and Maintenance, Business Administrator, Registrar, Executive Assistant to the

President/Personnel Services, Director of Information Services and Alumni Affairs, Director of Student Services, Chief Engineer and Maintenance Supervisor, Assistant Registrar-Admissions, Director of Library and Audio-Visual Services, Accounting Manager, Secretary to the Council, Secretary to the President, and persons above such ranks, persons covered by the interim certificate issued by the Board dated August 7, 1981 (Board File No. 0860-81-R), Teaching Faculty, Technicians and student interns". (90 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on list as originally prepared by employer		90
Number of persons who cast ballots	35	
Number of ballots marked in favour of applicant	34	
Number of ballots marked against applicant	1	

1190-81-R: International Ladies' Garment Workers' Union, (Applicant) v. Rubin Arnold Limited carrying on business under the firm name and style of York Manufacturing & Silk Screening Co., (Respondent), v. Group of Employees, (Objectors).

Unit: "all employees of the respondent in Metropolitan Toronto, save and except forepersons, persons above the rank of foreperson, mechanics, designers, office and sales staff and those persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period". (137 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters' list		139
Number of persons who cast ballots	134	
Number of spoiled ballots	1	
Number of ballots marked in favour of applicant	74	
Number of ballots marked against applicant	58	
Ballots segregated and not counted	1	

APPLICATIONS FOR CERTIFICATION DISMISSED

No Vote Conducted

0193-81-R: Service Employees International Union affiliated with A.F. of L., C.I.O., C.L.C., (Applicant) v. Ottawa General Hospital, (Respondent).

0945-81-R: Canadian Union of Public Employees, (Applicant) v. Queen's University of Kingston, (Respondent) v. Queen's University Staff Association, (Intervener) v. Group of Employees, (Objectors).

0968-81-R: United Brotherhood of Carpenters and Joiners of America Local 1190, (Applicant) v. J. R. Donia Construction Limited, (Respondent).

1063-81-R: United Brotherhood of Carpenters and Joiners of America Local 1190, (Applicant) v. G. H. Baliko Carpentry, (Respondent).

1092-81-R: Lean Flow Metal Products Employees Association, (Applicant) v. Lean Flow Metal Products, Inc., (Respondent).

1191-81-R: Gillian Watier and other employees, (Applicant) v. United Steelworkers of America Local 6363, (Respondent) v. Onaping Falls Food's Limited, (Intervener).

1128-81-R: Local 47, Sheet Metal Workers International Association, (Applicant) v. Aluminum Specialties (Ottawa) Limited, (Respondent).

1245-81-R: Office and Professional Employees International Union, Local 343, (Applicant) v. Westclox Canada Limited, (Respondent).

1432-81-R: International Beverage Dispensers' and Bartenders' Union Local 280 of the Hotel and Restaurant Employees and Bartenders' International Union, AFL-CIO-CLC, (Applicant) v. Granite Club Limited, (Respondent).

1433-81-R: International Printing and Graphic Communications Union, (Applicant) v. Standard-Freeholder a Division of Canadian Newspapers Company Limited (Respondent) v. Group of Employees, (Objectors).

1437-81-R: Canadian Union of Public Employees, (Applicant) v. Canada's Capital Building Services Limited, (Respondent) v. Group of Employees, (Objectors).

Applications for Certification Dismissed Subsequent to a Pre-Hearing Vote

0902-81-R: Canadian Paperworkers Union, (Applicant) v. Custom Sawmill (Hearst) Limited, (Respondent) v. Lumberand Sawmill Workers Union, Local 2995, of the United Brotherhood of Carpenters and Joiners of America, (Intervener).

Unit: "all employees of the respondent working at and out of its sawmill, planing mill and yeard operations at Hearst, Ontario, save and except foremen, persons above the rank of foreman and office and sales staff". (139 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters' list	151
Number of persons who cast ballots	125
Number of ballots marked in favour of applicant	36
Number of ballots marked in favour of intervener	89

Applications for Certification Dismissed Subsequent to a Post-Hearing Vote

0570-80-R: United Food and Commercial Workers International Union, AFL-CIO-CLC, (Applicant) v. Primo Importing and Distributing Co. Ltd., (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent in Metropolitan Toronto save and except forepersons, and those above the rank of foreperson, office and clerical staff, sales staff, and students employed during the school vacation". (192 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters' list	197
Number of persons who cast ballots	188
Number of spoiled ballots	2
Number of ballots marked in favour of applicant	69
Number of ballots marked against applicant	116
Ballots segregated and not counted	1

0561-81-R: International Union, United Automobile, Aerospace & Agricultural Implement Workers of America (U.A.W.), (Applicant) v. Gabriel of Canada Limited — Ingersoll Plant, (Respondent) v. United Steelworkers of America, (Intervener).

Unit: "all employees of the respondent in the Town of Ingersoll, Ontario save and except supervisors, persons above the rank of supervisor, office and sales staff, plant production inventory control person, technical engineering and professional employees and security guards". (53 employees in unit).

Number of names of persons on list as originally prepared by employer	84
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Number of persons who cast ballots	83
Number of ballots marked in favour of applicant	34
Number of ballots marked in favour of intervener	23
Number of ballots marked in favour of no union	26

0758-81-R: Labourers' International Union of North America, Local 183, (Applicant) v. C.A.S. Carpentry Co., (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (12 employees in unit).

Number of names of persons on revised voters' list	11
Number of persons who cast ballots	7
Number of ballots marked in favour of Labourers' International Union of North America, Local 183	1
Number of ballots marked in favour of United Brotherhood of Carpenters and Joiners of America Local 1190	6

0795-81-R: Teamsters Local Union No. 419, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. O. Hoppe Limited, (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent working in Metropolitan Toronto save and except supervisors, those above the rank of supervisor, office and sales staff, and students employed in the school vacation period". (23 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on list as originally prepared by employer	24
Number of persons who cast ballots	13
Number of ballots marked in favour of applicant	0
Number of ballots marked against applicant	13

0957-81-R: Energy and Chemical Workers Union, (Applicant) v. BASF Canada Inc., (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent at Metropolitan Toronto save and except foremen, persons above the rank of foreman, office, sales, and clerical staff". (21 employees in unit).

Number of names of persons on list as originally prepared by employer	30
Number of persons who cast ballots	29
Number of ballots marked in favour of applicant	13
Number of ballots marked against applicant	16

1236-81-R: Teamsters, Chemical, Energy and Allied Workers, Local Union No. 424, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. Richardson-Vicks Limited, (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent in the Municipality of Metropolitan Toronto, save and except foremen, foreladies and persons above the rank of foreman and forelady, laboratory technicians, students, office and sales staff". (139 employees in unit).

APPLICATIONS FOR CERTIFICATION WITHDRAWN

0237-81-R: International Union of Operating Engineers, Local 793, (Applicant) v. C D C Contracting, a division of Patron Contracting Limited, (Respondent) v. Employees, (Objectors).

0320-81-R: Canadian Union of Operating Engineers and General Workers, (Applicant) v. City Taxi, Diamond Taxi (Ottawa) Limited, Aurora Taxi, Ray Fathi (Taxi), ABC Taxi (Ottawa Taxi Holdings Limited), Best (Taxi) and Blue Line (Taxi Company Limited), (Respondents).

0356-81-R: Canadian Union of Operating Engineers and General Workers, (Applicant) v. City Taxi, Diamond Taxi (Ottawa) Limited, Aurora Taxi, Ray Fathi (Taxi), ABC Taxi (Ottawa Taxi Holdings Limited), Best (Taxi) and Blue Line (Taxi Company Limited), (Respondents).

0357-81-R: Canadian Union of Operating Engineers and General Workers, (Applicant) v. City Taxi, Diamond Taxi (Ottawa) Limited, Aurora Taxi, Ray Fathi (Taxi), ABC Taxi (Ottawa Taxi Holdings Limited), Best (Taxi) and Blue Line (Taxi Company Limited), (Respondents).

0392-81-R: Canadian Union of Operating Engineers and General Workers, (Applicant) v. City Taxi, Diamond Taxi (Ottawa) Limited, Aurora Taxi, Ray Fathi (Taxi), ABC Taxi (Ottawa Taxi Holdings Limited), Best (Taxi) and Blue Line (Taxi Company Limited), (Respondents).

0393-81-R: Canadian Union of Operating Engineers and General Workers, (Applicant) v. City Taxi, Diamond Taxi (Ottawa) Limited, Aurora Taxi, Ray Fathi (Taxi), ABC Taxi (Ottawa Taxi Holdings Limited), Best (Taxi) and Blue Line (Taxi Company Limited), (Respondents).

0394-81-R: Canadian Union of Operating Engineers and General Workers, (Applicant) v. City Taxi, Diamond Taxi (Ottawa) Limited, Aurora Taxi, Ray Fathi (Taxi), ABC Taxi (Ottawa Taxi Holdings Limited), Best (Taxi) and Blue Line (Taxi Company Limited), (Respondents).

0414-81-R: Canadian Union of Operating Engineers and General Workers, (Applicant) v. City Taxi, Diamond Taxi (Ottawa) Limited, Aurora Taxi, Ray Fathi (Taxi), ABC Taxi (Ottawa Taxi Holdings Limited), Best (Taxi) and Blue Line (Taxi Company Limited), (Respondents).

0821-81-R: Retail Clerks Union, Local 409, (Applicant) v. Phillips Security Agency Inc., (Respondent).

0909-81-R: Laundry, Dry Cleaning and Dye House Workers' International Union Local 351, (Applicant) v. Trans Nations Incorporated or Trusthouse Forte Inc. D.B.A. King Edward, (Respondent) v. Hotel, Restaurant and Cafeteria Employees' Union, Local 75, (Intervener).

1048-81-R: Canadian Labour Congress, Directly Chartered Local 1689, Canadian Association of Burlesque Entertainers, (Applicant) v. Colonia Tavern Limited, (Respondent).

1051-81-R: Canadian Labour Congress, Chartered Local Union No. 1689 (Canadian Association of Burlesque Entertainers), (Applicant) v. Fantasia Tavern, (Respondent).

1112-81-R: Labourers' International Union of North America, Local 183, (Applicant) v. Cambryan Construction Limited O/B Valley Carpenter Contractors, (Respondent).

1133-81-R: International Union of Operating Engineers, Local 793, (Applicant) v. ACZ Contractors Limited, (Respondent).

1184-81-R: International Union of Operating Engineers, Local 793, (Applicant) v. ACZ Contracting Limited, (Respondent).

1188-81-R: Canadian Labour Congress, Directly Chartered Local 1689, Canadian Association of Burlesque Entertainers, (Applicant) v. Safari Restaurant, (Respondent).

1206-81-R: Labourers' International Union of North America, Local 183, (Applicant) v. Findlay Carpentry, (Respondent) v. United Brotherhood of Carpenters and Joiners of America Local 1190, (Intervener).

1230-81-R: Labourers' International Union of North America, Local 506, (Applicant) v. A. N. Shaw Restoration Ltd., (Respondent) v. The Operative Plasterers' and Cement Masons' International Association of the United States and Canada, Local Union No. 172 Restoration Steeleplejacks, (Intervener).

1324-81-R: International Union of Electrical Radio and Machine Workers, (Applicant) v. Tul Safety Equipment, (Respondent) v. Group of Employees, (Objectors).

1361-81-R: Canadian Union of Public Employees, (Applicant) v. The Corporation of the County of Lambton, (Respondent).

1391-81-R: International Union of Operating Engineers, Local 793, (Applicant) v. Clarkay Contracting Limited, (Respondent).

1426-81-R: Laundry and Linen Drivers and Industrial Workers Union, Local 847, (Applicant) v. Capital Commercial Laundry Limited, (Respondent).

1435-81-R: International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, Local No. B 173, (Applicant) v. Royal Alexandra Theatre, the registered business name and style of Ed Mirvish Enterprises Limited, (Respondent).

1436-81-R: International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, Local No. B 173, (Applicant) v. Royal Alexandra Theatre, the registered business name and style of Ed Mirvish Enterprises Limited, (Respondent).

1472-81-R: Labourers' International Union of North America, Local 1837, (Applicant) v. Clarkson Construction Company Limited, (Respondent).

1473-81-R: Labourers' International Union of North America Local 837, (Applicant) v. G. J. Ranye Limited, (Respondent).

1516-81-R: London and District Service Workers', Local 220 SEIU, AFL, CIO, CLC, (Applicant) v. Extendicare (Pt. Stanley) Ltd., (Respondent).

1532-81-R: Canadian Union of Public Employees, (Applicant) v. Adult Rehabilitation Centre (ARC Industries), (Respondent).

APPLICATIONS FOR DECLARATION OF RELATED EMPLOYER

0223-81-R: United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 463, (Applicant) v. George Hamers Limited and L. & M. Plumbing & Heating, (Respondents). (*Dismissed*).

0226-81-R: United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 463, (Applicant) v. George Hamers Limited and L. & M. Plumbing & Heating, (Respondents). (*Dismissed*).

0594-81-R: United Brotherhood of Carpenters and Joiners of America, Local Union No. 446, (Applicant) v. Subito Contracting (Drywall & Painting) Co. Limited; CM and Superior Drywall and Painting Co. Inc.; and Pioneer Contracting (Drywall & Painting) Inc., (Respondents). (*Granted*).

1222-81-R: The Carpenters' District Council of Toronto and Vicinity, United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Hardrock Forming Co. (270915 Ontario Limited) and Bender Construction Limited, (Respondents). (*Granted*).

SALE OF A BUSINESS

0223-81-R: United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 463, (Applicant) v. George Hamers Limited and L. & M. Plumbing and Heating, (Respondents). (*Dismissed*).

0594-81-R: United Brotherhood of Carpenters and Joiners of America, Local Union No. 446, (Applicant) v. Subito Contracting (Drywall & Painting) Co. Limited; CM and Superior Drywall and Painting Co. Inc.; and Pioneer Contracting (Drywall & Painting) Inc., (Respondents). (*Granted*).

0716-81-R: Hotel, Motel and Restaurant Employees Union, Local 442, (Applicant) v. Ontario 474619 Ltd., (Respondent). (*Dismissed*).

UNION SUCCESSOR RIGHTS

0988-81-R: Ontario Public Service Employees Union, (Applicant) v. The Grey County Board of Education, (Respondent) v. The Grey County Board of Education Secretarial Association, (Predecessor Trade Union) v. Group of Employees, (Objectors). (*Granted*).

APPLICATIONS FOR DECLARATION TERMINATING BARGAINING RIGHTS

0663-81-R: Douglas S. Nelson Employee of Malcolm Isbister & Co. Ltd., (Applicant) v. Operative Plasterers' and Cement Masons' International Association of the United States and Canada, Local 172, (Respondent) v. Malcolm Isbister & Co. Ltd., (Intervener). (*Granted*).

0943-81-R: Marie-Claire Coulombe and Group of Employees of Charterways Transportation Limited, (Applicant) v. London & District Service Workers' Union, Local 220, SEIU, AFL, CIO, CLC, (Respondent) v. Charterways Transportation Limited, (Intervener).

Unit: "all employees of (the intervener) at Kitchener, Ontario employed for not more than twenty-four (24) hours per week and students, save and except supervisors and foremen, persons above the rank of supervisor and foreman, office and clerical staff and dispatchers and persons covered by a subsisting agreement between Charterways Transportation Limited and Charterways Full-Time Highway Drivers (sic)". (51 employees in unit). (*Dismissed*).

Number of names of persons on revised voters' list	53
Number of persons who cast ballots	50
Number of ballots marked in favour of respondent	30
Number of ballots marked against respondent	20

0996-81-R: Werner P. Licis, (Applicant) v. Teamsters Local Union No. 419, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Respondent) v. T. Puckrin & Son Ltd., (Intervener). (*Dismissed*).

1201-81-R: Dwain Packard, (Applicant) v. International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, (U.A.W.), (Respondent) v. Jutras Die Casting Limited, (Intervener).

Unit: "all employees in Jutras Die Casting Ltd., save and except supervisors, persons above the rank of supervisor, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period". (64 employees in unit). (*Dismissed*).

Number of names of persons on list as originally prepared by employer		70
Number of persons who cast ballots	65	
Number of ballots marked in favour of respondent	36	
Number of ballots marked against the respondent	29	

1304-81-R: Mrs. Rita LaHaie, (Applicant) v. United Steelworkers of America, Local 3997, (Respondent). (*Withdrawn*).

1305-81-R: John Norman McPherson, (Applicant) v. Labourers International Union Local 506, (Respondent). (*Withdrawn*).

1315-81-R: Visiting Homemakers Association of Ottawa, (Applicant) v. Canadian Union of Public Employees, (Respondent). (*Withdrawn*).

1360-81-R: Chaterine A. St. John, (Applicant) v. Service Employees International Union, Local 663, (Respondent) v. Trenton Memorial Hospital, (Intervener). (*Dismissed*).

1408-81-R: Shop Employees of Porter Precision Products Canada Ltd., M. Rajput, (Applicant) v. Labourers' International Union of North America, Local 183, (Respondent). (*Dismissed*).

APPLICATIONS FOR DECLARATION OF UNLAWFUL STRIKE

1317-81-U: Davidson — Walker Funeral Homes, (Applicant) v. Retail Commercial and Industrial Union, Local 206, chartered by the United Food & Commercial Workers' International Union, (Respondent). (*Dismissed*).

1421-81-U: Hyde Spring & Wire (Canada) Ltd., (Applicant) v. Those Persons Named in Schedules "A", "B", "C", "D", Hereto, (Respondents). (*Granted*).

1461-81-U: Humpty Dumpty Foods Limited, (Applicant) v. Retail, Wholesale and Department Store Union, Local 461, (Respondent). (*Withdrawn*).

1574-81-U: John Wood Manufacturing Limited, (Applicant) v. Respondents named in Schedule "A", (Respondents). (*Granted*).

1577-81-U: Westeel Rosco Limited, (Applicant) v. United Steelworkers of America and its Local 6448, John Fitzpatrick and Richard Vaughan, (Respondents). (*Granted*).

APPLICATIONS FOR DECLARATION OF UNLAWFUL STRIKE CONSTRUCTION INDUSTRY

1415-81-U: Cadco Contracting Limited and Gillanders Construction Limited, (Applicants) v. The United Brotherhood of Carpenters and Joiners of America, Local 675, and Gus Simone and William Johnston, (Respondents). (*Granted*).

1470-81-U: United Building Contracting Ltd., (Applicant) v. Labour Council of the AFL-CIO for Brantford, Hamilton and Oakville, (Respondent). (*Withdrawn*).

1491-81-U: MHG International Ltd., (Applicant) v. International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Foregers and Helpers, Lodge 128 et al, (Respondents). (*Granted*).

APPLICATIONS FOR DECLARATION OF UNLAWFUL LOCKOUT

1447-81-U: United Steelworkers of America, (Applicant) v. Northeast Tool & Die Works Ltd. and R. A. Lesperance, (Respondent) (*Granted*).

COMPLAINTS OF UNFAIR LABOUR PRACTICE

0134-80-U: Operative Plasterers' and Cement Masons' International Association, Local 598, (Complainant) v. Underground Services Limited and Labourers' International Union of North America, Local 183, (Respondent). (*Dismissed*).

0686-80-U: United Food and Commercial Workers International Union, AFL-CIO-CLC, (Complainant) v. Primo Importing and Distributing Co. Ltd., (Respondent) v. Group of Employees, (Objectors). (*Granted*).

1899-80-U: Bruce McWilliams, (Complainant) v. Fur, Leather, Shoe & Allied Workers' Union, Local 82 affiliated with United Food and Commercial Workers International Union, AFL-CIO, (Respondent #1) v. Rajac Leather and Sportswear Limited, (Respondent #2). (*Dismissed*).

2403-80-U: William R. Stewart, Amarnath Bhatia, John McDougall, Ed Northcott and Dale Wendover, (Complainants) v. Teamsters Union, Local 419, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Respondent) v. K-Mart Distribution Centre, (Intervener). (*Dismissed*).

2710-80-U: Marcel Fortin, (Complainant) v. Bedard Girard Ontario, Division of B G Checo International Limited and Millwright Local 1425, United Brotherhood of Carpenters and Joiners of America, (Respondents). (*Granted*).

0085-81-U: United Cement, Lime, & Gypsum Workers International Union, (Complainant) v. Dominion Paving Limited, (Respondent). (*Granted*).

0104-81-U: John Sanna, (Complainant) v. Canadian Union of Public Employees, Local 16, (Respondent) v. St. Mary's College, (Intervener). (*Dismissed*).

0174-81-U: Hotel and Restaurant Employees Union, Local 743, (Complainant) v. Winco Restaurants Ltd., (Respondent). (*Withdrawn*).

0365-81-U: Donald Lawrence, (Complainant) v. Sonic Transport Systems Limited, (Respondent). (*Granted*).

0567-81-U: Service Employees International Union, (Complainant) v. Ottawa General Hospital, (Respondent). (*Dismissed*).

0700-81-U: United Steelworkers of America, (Complainant) v. Novi Canadian Limited, (Respondent). (*Granted*).

1093-81-U: Bakery, Confectionery & Tobacco Workers' International Union, Local 264, (Complainant) v. W. & H. Woortman Limited, (Respondent). (*Withdrawn*).

1134-81-U: Ontario Public Service Employees Union, (Complainant) v. Renaissance Homes Inc., (Respondent). (*Granted*).

1212-81-U: Southern Ontario Newspaper Guild, (Complainant) v. Oshawa This Week and Oshawa This Weekend, Divisions of Metroland Printing and Publishing Ltd., (Respondent). (*Withdrawn*).

1213-81-U: Southern Ontario Newspaper Guild, Local 87, The Newspaper Guild (A.F.L.-C.I.O.-C.L.C.), (Complainant) v. Burlington Post and Weekend Post, Division of Metroland Printing and Publishing Ltd., (Respondent). (*Withdrawn*).

1220-81-U: Teamsters Local Union No. 419, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Complainant) v. Greb Industries, a Division of Warrington Products Limited, (Respondent). (*Withdrawn*).

1235-81-U: Toronto Typographical Union No. 91 (ITU), (Complainant) v. Shervill-Dickson Limited, (Respondent). (*Granted*).

1241-81-U: Teamsters Union Local 938, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Complainant) v. G. & C. Transport (Milton) Ltd., (Respondent). (*Withdrawn*).

1255-81-U: Service Employees' International Union, Local 183, AFL, CIO, CLC, (Complainant) v. Robin Hood Multifoods Limited, (Respondent). (*Withdrawn*).

1286-81-U: Chaudietta Games, (Complainant) v. C.U.P.E., Local 1584, (Respondent). (*Withdrawn*).

1300-81-U: Denise Twonbly, (Complainant) v. Christie Borwn & Co. Ltd., (Respondent). (*Withdrawn*).

1301-81-U: United Brotherhood of Carpenters and Joiners of America, Local 2679, (Complainant) v. Rockett Lumber and Building Supplies Limited, (Respondent). (*Withdrawn*).

1312-81-U: International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, (U.A.W.), (Respondent). (*Withdrawn*).

1316-81-U: Kevin G. Dunphy, (Complainant) v. Foodcorp Limited, carrying on business as Swiss Chalet Bar-B-Que, (Respondent). (*Withdrawn*).

1325-81-U: Alfred Sardone, (Complainant) v. Local 5058, United Steelworkers, (Respondent). (*Withdrawn*).

1341-81-U: Ontario Public Service Employees Union, (Complainant) v. Thames Valley Ambulance Limited, (Respondent). (*Granted*).

1342-81-U: Margaret Elizabeth Lachner, (Complainant) v. TRS Food Service, (Respondent). (*Withdrawn*).

1343-81-U: Dorothy Elizabeth Downey, (Complainant) v. TRS Food Service, (Respondent). (*Withdrawn*).

1375-81-U: United Brotherhood of Carpenters and Joiners of America, Local 2050, (Complainant) v. Thom Construction Limited, (Respondent). (*Withdrawn*).

1390-81-U: Service Employees International Union, Local 183, (Complainant) v. Pennell Holdings Ltd., c.o.b. as The Fireside Inn, (Respondent). (*Withdrawn*).

1406-81-U: Joanne Whitehead, Shirley Linghurst, (Complainants) v. United Glass & Ceramic Workers of North America Local 270, (Respondent). (*Withdrawn*).

1417-81-U: Office and Professional Employees International Union, Local 343, (Complainant) v. Canadian Union of Public Employees, Local 767, (Respondent). (*Withdrawn*).

1418-81-U: Office and Professional Employees International Union, Local 343, (Complainant) v. Canadian Union of Public Employees, Local 767, (Respondent). (*Withdrawn*).

1439-81-U: David Tarasco and George Atkinson, (Complainant). v. Leslie Kovasci (President) CUPE, Local 43, (Respondent). (*Withdrawn*).

1442-81-U: Oliver George Tenn, (Complainant) v. United Electrical Radio and Machine Workers of America, Local 507, (Respondent). (*Withdrawn*).

1445-81-U: Canadian Union of Public Employees, (Complainant) v. Canada's Capital Building Services Limited, (Respondent). (*Withdrawn*).

1451-81-U: United Steelworkers of America, (Complainant) v. Desmarais & Frere Ltd., (Respondent). (*Withdrawn*).

1452-81-U: Douglas J. Whittaker, (Complainant) v. Zehrs Markets Ltd. and the Retail and Commercial and Ind. Union Local 206, (Respondent). (*Withdrawn*).

1463-81-U: Joe Portiss, (Complainant) v. Local 1089, Business Representative, (Respondent). (*Withdrawn*).

1486-81-U: Christian Labour Association of Canada, (Complainant) v. Ark Eden Nursing Home (Respondent). (*Withdrawn*).

1496-81-U: Lauie Antonqiouanni (Complainant) v. Ron Renning, (Respondent). (*Withdrawn*).

1501-81-U: Steve Cyncora, (Complainant) v. International Brotherhood of Baoilermakers, Shipbuilders, Welders and Helpers, Local Union No. 128, (Respondent). (*Withdrawn*).

1569-81-U: Millworkers Local #802, United Brotherhood of Carpenters and Joiners of America, (Complainant) v. Arnold Manufacturing Limited, (Respondent). (*Withdrawn*).

APPLICATIONS FOR RELIGIOUS EXEMPTION

1126-81-M: Kimberley Marsanic, (Applicant) v. Canadian Union of Public Employees, Local 1874, (Respondent Trade Union) v. Metro Toronto School Board, (Respondent Employer). (*Dismissed*).

APPLICATIONS FOR CONSENT TO EARLY TERMINATION OF COLLECTIVE AGREEMENT

1398-81-M: Foodcorp Limited, carrying on business as Swiss Chalet Bar B.Q., (Applicant) v. Canadian Union of Restaurant and Related Employees, (Respondent). (*Granted*).

1399-81-M: Foodcorp Limited, carrying on business as Swiss Chalet Bar B. Q., (Applicant) v. Canadian Union of Restaurant and Related Employees, (Respondent). (*Granted*).

1400-81-M: Foodcorp Limited, carrying on business as Swiss Chalet Bar B. Q., (Applicant) v. Canadian Union of Restaurant and Related Employees, (Respondent). (*Granted*).

1401-81-M: Foodcorp Limited, carrying on business as Swiss Chalet Bar B. Q., (Applicant) v. Canadian Union of Restaurant and Related Employees, (Respondent). (*Granted*).

JURISDICTIONAL DISPUTES

1330-81-JD: United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, (Complainant) v. Ontario Hydro and United Brotherhood of Carpenters and Joiners of America (Millwrights), (Respondents). (*Withdrawn*).

0330-81-JD: Toronto-Central Ontario Building and Construction Trades Council and United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 46, (Complainants) v. Simcoe Mechanical Contracting Limited and Christian Labour Association of Canada, (Respondents) v. Mechanical Contractors Association of Toronto, (Intervener #1) v. Mechanical Contractors Association of Ontario, (Intervener #2). (*Granted*).

APPLICATIONS FOR DETERMINATION OF EMPLOYEE STATUS

0869-81-M: Service Employees International Union, Local 268, (Applicant) v. Thunder Bay Ambulance Services Inc., (Respondent). (*Withdrawn*).

1073-81-M: Canadian Union of Public Employees, (Applicant) v. The London Public Library Board, (Respondent). (*Withdrawn*).

1336-81-M: Canadian Union of Public Employees, and its Local 87, (Applicant) v. The Corporation of the City of Thunder Bay, (Respondent). (*Terminated*).

CONSTRUCTION INDUSTRY GRIEVANCES

0394-80-M: Operative Plasterers' and Cement Masons' International Association, Local 598, (Applicant) v. Underground Services Limited, (Respondent). (*Dismissed*).

0404-81-M: United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 463, (Applicant) v. George Hamers Limited and L. & M. Plumbing & Heating, (Respondents). (*Granted*).

0475-81-M: The Ironworkers District Council of Ontario and International Association of Bridge, Structural and Ornamental Ironworkers Local Unions 700, 721, 736, 759, 765 and 786, (Applicant) v. The Ontario Erectors Association and Ins-Co Sarnia Ltd., (Respondents). (*Granted*).

0664-81-M: Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftsmen and International Union of Bricklayers and Allied Craftsmen, Local 23, (Applicants) v. Fred Jantz Masonry Construction Company Limited, (Respondent). (*Granted*).

1159-81-M: United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 46, (Applicant) v. Mayweld Company Limited, (Respondent). (*Withdrawn*).

1181-81-M: Labourers' International Union of North America, Local 1059, (Applicant) v. Wonnacott Excavating Ltd., (Respondent). (*Dismissed*).

1257-81-M: Labourers' International Union of North America, Local 1059, (Applicant) v. Wm. Parker Construction Limited, (Respondent). (*Granted*).

1258-81-M: International Union of Operating Engineers, Local 793, (Applicant) v. Matthews Group Limited, (Respondent). (*Withdrawn*).

1262-81-M: Plasterers and Cement Masons International Association of the United States and Canada, Local Union 124, (Applicant) v. Carrier Brothers Limited, (Respondent). (*Granted*).

1299-81-M: The Carpenters' Section of the Carpenters' District Council of Toronto and Vicinity, United Brotherhood of Carpenters' and Joiners of America, on behalf of Local Union 1190, (Applicant) v. Casalbil Contractors Limited, (Respondent). (*Granted*).

1321-81-M: The Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27, 666, 675, 681, 1133, 1304, 1747, 1963, 32227 and 3233, United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Colmas Interior Contractors Drywall, (Respondent). (*Granted*).

1322-81-M: Resilient Floor Workers', Local Union 2965, (Applicant) v. Barwood Sales (Ont.) Ltd. (Respondent). (*Withdrawn*).

1323-81-M: United Brotherhood of Carpenters and Joiners of America — Local 18, (Applicant) v. Richway Construction Limited, (Respondent). (*Withdrawn*).

1357-81-M: International Association of Heat and Frost Insulators and Asbestos Workers, Local 95, (Applicant) v. Various Employers Listed on Schedule "A" and Master Insulators' Association of Ontario, Incorporated, (Respondents). (*Withdrawn*).

1358-81-M: Sheet Metal Workers' International Association, Local 562, (Applicant) v. S.E. Rozell & Sons Inc., (Respondent). (*Dismissed*).

1363-81-M: The Carpenters' Section of the Carpenters' District Council of Toronto and Vicinity, United Brotherhood of Carpenters and Joiners of America, on behalf of Local Union 1190, (Applicant) v. 379036 Ontario Limited, (Respondent). (*Granted*).

1382-81-M: Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27, 666, 681, 1133, 1304, 1747, 1963, 32227 and 3233, United Brotherhood of Carpenters' and Joiners of America, (Applicant) v. Colt Contracting Co. Ltd., (Respondent). (*Withdrawn*).

1388-81-M: Marble, Tile and Terrazzo Union, Local 31, affiliated with International Union of Bricklayers and Allied Craftsmen, (Applicant) v. Zeppa Tile Inc., (Respondent). (*Granted*).

1422-81-M: Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27, 666, 681, 1133, 1304, 1747, 1963, 3227, and 3233, United Brotherhood of Carpenters' and Joiners of America, (Applicant) v. Chairman Mills, (Respondent). (*Granted*).

1428-81-M: International Association of Heat and Frost Insulators and Asbestos Workers, Local 95 (Applicant) v. Thunder Bay Insulations Limited, (Respondent). (*Withdrawn*).

1429-81-M: International Association of Heat and Frost Insulators and Asbestos Workers, Local 95, (Applicant) v. Ridgewood Insulation Limited, (Respondent). (*Withdrawn*).

1430-81-M: International Association of Heat and Frost Insulators and Asbestos Workers, Local 95, (Applicant) v. Standard Insulation Limited, (Respondent). (*Withdrawn*).

1438-81-M: Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27, 666, 681, 1133, 1304, 1747, 1963, 32227 and 3233, United Brotherhood of Carpenters' and Joiners of America, (Applicant) v. Markville Investment Ltd., (Respondent). (*Withdrawn*).

1455-81-M: Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27, 666, 681, 1133, 1304, 1747, 1963, 675, 3227, and 3233, United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Colmac Interior Contractors, (Respondent). (*Granted*).

1508-81-M: Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27, 666, 681, 1133, 1304, 1747, 1963, 3227, and 3233, United Brotherhood of Carpenters' and Joiners of America, (Applicant) v. L. & M. Caulking Ltd., (Respondent). (*Withdrawn*).

1520-81-M: The Ontario Council of Painters and Allied Trades Local 1783, (Applicant) v. Westway Painting Co. Ltd., (Respondent). (*Withdrawn*).

APPLICATIONS FOR RECONSIDERATION OF BOARD'S DECISION

1820-77-R: Ontario Nurses' Association, (Applicant) v. Arnprior and District Memorial Hospital, (Respondent) v. Group of Employees, (Objectors). (*Denied*).

2837-80-U: Alexander Barna, (Complainant) v. The Canadian Brotherhood of Railway, Transport and General Workers and its Local 271, (Respondents). (*Denied*).

0991-81-R: Toronto Auto Parks (Airport) Limited, (Applicant) v. Canadian Union of Public Employees, (Respondent). (*Denied*).

1295-81-M: United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 787, (Applicant) v. Perrin Turner Limited, (Respondent). (*Granted*).

*Ontario Labour Relations Board,
400 University Avenue,
Toronto, Ontario*

ISSN 0383-4778



Ontario
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NOTICE

BOARD GEOGRAPHIC AREAS IN THE CONSTRUCTION INDUSTRY

The Ontario Labour Relations Board has reviewed the geographic areas which it applies pursuant to section 119(1) of the *Labour Relations Act* in determining the appropriate bargaining units in applications for certification made under the construction industry provisions of the *Labour Relations Act*. The Board has revised the descriptions of those geographic areas to reflect the municipal boundaries currently in effect. The actual geographic areas have remained the same, while the descriptions have changed.

The revised descriptions, which will be applied commencing January 1st, 1982, are as follows:

Board Area Number	Description
1.	The Counties of Essex and Kent.
2.	The County of Lambton.
3.	The Counties of Oxford, Perth, Huron, Middlesex, Bruce, and Elgin.
4.	The County of Brant and that portion of the Regional Municipality of Haldimand-Norfolk coming within the former County of Norfolk.
5.	The Regional Municipality of Niagara and that portion of the Regional Municipality of Haldimand-Norfolk coming within the former County of Haldimand.
6.	The Regional Municipality of Waterloo (except that portion of the geographic Township of Beverly annexed by North Dumfries Township.)
7.	The County of Wellington.
8.	The Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Township of Esquesing, and the Towns of Ajax and Pickering in the Regional Municipality of Durham.
9.	The Regional Municipality of Durham (except for the Towns of Ajax and Pickering) the geographic Township of Cavan in the County of Peterborough and the geographic Township of Manvers in the County of Victoria.
10.	The Towns of Cobourg and Port Hope, and the geographic Townships of Hope, Hamilton, Haldimand and Alnwick in the County of Northumberland.
11.	The County of Peterborough (except for the geographic Township of Cavan) the County of Victoria (except for the geographic Township of Manvers) and the provisional County of Haliburton.

12. Prince Edward County, the geographic Townships of Lake, Tudor and Grimsthorpe and all lands south thereof in the County of Hastings, and the geographic Townships of Percy and Cramahe and all lands east thereof in the County of Northumberland.
13. The County of Lanark, the geographic Townships of South Crosby, Bastard, Kitley, Wolford, Oxford (on Rideau) and South Gower and all lands north thereof in the United Counties of Leeds and Grenville.
14. The County of Renfrew.
15. The Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell.
16. Within a radius of 33 kilometers (approximately 20 miles) of the North Bay post office.
17. Within a radius of 57 kilometres (approximately 35 miles) of the City of Sudbury Federal Building.
18. The County of Simcoe and the District Municipality of Muskoka.
19. Within a radius of 81 kilometres (approximately 50 miles) of the Timmins Federal Building.
20. The Town of Kirland Lake and the geographic Townships adjacent thereto in the District of Temiskaming.
21. That portion of the District of Algoma south of the 49th parallel of latitude.
22. The District of Thunder Bay.
23. The District of Rainy River.
24. The District of Kenora including the Patricia portion.
25. That portion of the District of Cochrane north of the 50th parallel of latitude.
26. The Regional Municipality of Hamilton-Wentworth, the City of Burlington, that portion of the geographic Township of Beverly annexed by North Dumfries Township and that portion of the Town of Milton within the geographic township of Nassagaweya.
27. The County of Dufferin.
28. The County of Grey.
29. The County of Lennox and Addington, the County of Frontenac, and the geographic Townships of Rear Leeds and Lansdowne, Rear of Yonge and Escott, and all lands south thereof in the United Counties of Leeds and Grenville.

30. The geographic Townships of Elizabethtown, Augusta and Edwardsburg and all lands south thereof in the United Counties of Leeds and Grenville.
31. The United Counties of Stormont, Dundas and Glengarry.
32. The District of Manitoulin (except that portion of the District of Manitoulin which comes within Board area #17).

NOTE:

All townships referred to in the above descriptions except for North Dumfries Township, are geographic townships, and therefore include any incorporated municipality, town, or village located within the geographic township.

0384-81-OH Laurie Meaden, Complainant, v. Tal Swartz, carrying on business under the name of **AMS Diamonds**, Respondent.

Health and Safety – Employee refusing to work with hydro cyanide – Whether reasonable grounds to believe that work dangerous – Whether subsequent confirmation that work safe by inspection diminishing employee's rights – Whether quit or discharge – Whether discharge for exercise of rights under Act.

BEFORE: M. G. Picher, Vice-Chairman, and Board Members W. G. Donnelly and M. J. Fenwick.

DECISION OF BOARD MEMBER W. G. DONNELLY; December 9, 1981 (Majority decision published in November, 1981 issue)

1. I will not repeat the facts of the case as the recital contained in the majority decision is exhaustive and complete.
2. I agree that the complainant refused to do the work in question because she honestly believed that to have done so would have endangered her health. She therefore had the right to refuse to do the task assigned to her, in accordance with the provisions of the Occupational Health and Safety Act 1978, hereinafter referred to as "the Act".
3. Ms. Meaden, prior to the day on which the incident took place, went to some lengths in consulting various authorities about the possible hazards of doing stripping work under the conditions which prevailed in the respondent's shop. In addition, she testified that she was informed by a Mr. O'Reilly of the Occupational Branch of the Ministry of Labour, inter alia, that "... if she felt in any peril she should call an inspector and stand by in a safe area of the shop pending inspection". (Quotation taken from paragraph 9 of the majority decision).
4. It is therefore clear that she was well informed of her rights and obligations under the Act but failed to stay at the place of work and call for an inspector as she was obliged to do. Had she done so no obligation for compensation would have arisen. On these grounds alone it would have only been fair and equitable for the Board to have ordered a sharing of any compensation due.
5. Substantiation of the fact that she knew that she had the right and obligation to ask for an inspector resides in the statement contained in paragraph 15 of the majority decision where it is stated: "*Immediately after leaving the shop Ms. Meaden telephoned Inspector O'Reilly of the Occupational Health Branch to complain about what had happened and to ask that an inspection of the premises be conducted*". (emphasis added)
6. The said paragraph 15 goes on to say "... it seems that the Branch took the view that an immediate inspection was not warranted because Ms. Meaden's employment was terminated". In a narrow, technical sense that view was in conformity with the Act, as written. However as Ms. Meaden had phoned immediately after leaving the work place I would suggest that the Branch's decision not to inspect immediately was a serious error of judgment. I do not think that the Branch can argue that it cannot exercise discretion in such cases, and an immediate inspection, in this instance, should have been ordered. Its failure to do so has inevitably compounded the quantum of compensation for which the Respondent will become

liable. I therefore believe that the Occupational Health Branch should be aware of the facts of this case so that a degree of flexibility, which is not only desirable but necessary, in interpreting the provisions of the Act be exercised in order to obviate similar results in future cases.

0893-80-JD Chatham Construction Workers Association, Local 53, affiliated with the Christian Labour Association of Canada, Complainant, v. The Heavy Construction Association of Windsor, **Armbro Materials & Construction Ltd.**, and International Union of Operating Engineers, Local 793, and William Conlin, Respondents.

Jurisdictional Dispute – Whether Board having jurisdiction under section 91 – Whether applicant made request of employer that work be assigned to its members – Board not distinguishing facts from *Napev Construction*

BEFORE: D. E. Franks, Vice-Chairman, and Board Members H. J. F. Ade and C. A. Ballentine.

APPEARANCES: *Wm. R. Herridge, Steven Stuart and Ed Crootenboer for the complainant; G Grossman for The Heavy Construction Association of Windsor; Daniel Fryzuk for Armbro Materials & Construction Ltd.; A. M. Minsky, E. A. Ford and William Conlin for International Union of Operating Engineers, Local 793, and William Conlin.*

DECISION OF THE BOARD; December 15, 1981

1. This is a complaint concerning work assignment filed under section 91 of the *Labour Relations Act*. At the hearing in this matter, counsel for the respondent trade union challenged the jurisdiction of the Board to proceed with the complaint. The Board heard the argument of the parties and reserved its decision. Shortly after, the Board informed the parties that for reasons to follow the complaint was dismissed because the Board had no jurisdiction under section 91 to proceed with the complaint. Herein are the reasons for the Board's decision in this matter.

• • •

3. The parties submitted to the Board an agreed statement of facts as follows:

AGREED STATEMENT OF FACTS

1. The complainant is duly certified as the Bargaining Agent for all employees of H. T. Reaume Construction Limited (hereinafter referred to as Reaume) in the Counties of Kent and Essex engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-

working foreman, and all construction labourers in the employ of Reaume in the Counties of Kent and Essex, save and except non-working foremen and persons above the rank of non-working foreman. The Board's certificate was dated December 7, 1971.

2. There is currently in force a collective agreement between The Heavy Construction Association of Windsor (hereinafter referred to as HCA) (on behalf of Reaume) and the complainant.

3. Prior to June 13, 1980, Armbro Materials & Construction Ltd. (hereinafter referred to as Armbro) was the general contractor for work known as the E. C. Rowe Expressway job in Windsor. This job involved excavating and backfilling on a large railroad overpass. Armbro contracted with Reaume for the supply of a backhoe and bulldozer with an operator for each to perform the grading and backfilling work on this job. Armbro paid Reaume an hourly rate for the supply of the backhoe and bulldozer (with operators). Armbro is subject to a collective agreement between the HCA and a Council of Trade Unions representing, *inter alia*, the respondent Local 793. A copy of this collective agreement was filed in this complaint.

4. On June 13, 1980, Reaume engaged in performing its said work at the job site and was employing its employees, members of the complainant, pursuant to its collective agreement with the complainant. On that day, at the job site, William Conlin, a business agent of the respondent Local 793, requested Armbro's job superintendent to remove Reaume from the job site. Mr. Conlin stated that he was making this request pursuant to Articles 3.5 and 3.6 of the collective agreement between HCA and the said Council of Trade Union — since Reaume did not have a collective agreement with the said Council of Trade Unions. [Conlin stated as well that he made this request because the employees of Reaume were represented by the complainant and not by Local 793.] Reaume then told by Armbro's job superintendent that because he [Reaume] did not have a collective agreement with the said Council of Trade Unions he must leave the site by the end of the day. Reaume did this and has done no further work at the job site. Thereafter, the work which had formerly been performed by Reaume was subcontracted by Armbro to Smith Bros. Excavating (Windsor) Ltd., which company is subject to the same collective agreement with the said Council of Trade Unions as is Armbro. The employees of Smith Bros. who thereafter have been performing the grading and back filling at the project are members of Local 793. [After Reaume had left the job, Mr. Reaume called Conlin on the telephone. In the course of the telephone conversation Conlin stated, "you can't be working there, you're doing our work".]

5. In the course of the telephone conversation, Conlin informed Mr. Reaume in response to a question from Mr. Reaume that he [Conlin] took the action he did to enforce the subcontractor's clauses in the collective agreement between HCA.

The portions of the agreed statement of facts in parenthesis were not agreed to by the respondent trade union. Nevertheless, for the purposes of this case we can assume that they were accepted as agreed upon.

4. Articles 3.5 and 3.6 of the collective agreement referred to above read as follows:

3.5 The Employer agrees to engage only those sub-contractors, including owner-operators, who are in contractual relations with the Union to perform work set out in the classifications of this agreement.

3.6 The Employer agrees to remove any sub-contractor in violation of Section 3.5 upon written or verbal notification from the Union Representative.

5. The argument of the respondent trade union that the Board lacks jurisdiction in the present case is quite a simple one. Relying primarily on the decision of the Board in *Napev Construction Limited*, [1980] OLRB Rep. Feb. 247 as well as various cases cited therein, the respondent trade union argued that on the facts agreed to at no time did the respondent trade union ask or demand that Reaume employ members of the respondent Operating Engineers' union, nor on the facts can Armbro, the employer who let the contract to Reaume, be construed as the agent for the Operating Engineers since Armbro did not request that Reaume employ members of the Operating Engineers' union. Counsel therefore argues that at no time, either directly or indirectly, was a demand made of the employer, that is Reaume, that the work be assigned to members of one union rather than members of another union. In such circumstances, the condition precedent for the application of section 91 has not been obtained and the Board has no jurisdiction to deal with this complaint.

6. Counsel for the complainant candidly conceded that the *Napev* decision, *supra*, was the decision which he had to overcome in order to proceed with his complaint. He argues that the *Napev* decision is inapplicable given the facts of the present case since, unlike the *Napev* case, in the present case Armbro requested Reaume to leave the job and that this must be interpreted as a demand by the Operating Engineers for the work in question. He urged the Board to give effect to the decision of the Court in *Beer Precast*, [1969] 1 O.R. 405, by giving section 91 of the Act a broad interpretation and indeed find that the removal of Reaume from the job constituted a request for the work by the Operating Engineers through Armbro as its agent.

7. Counsel further argued that *Napev* was in effect a very narrow case and should be restricted to the very specific facts of that case, that is, where the general contractor (*Napev*) had no dealings with the subcontractor (*Venice*). In the present case, Armbro did in fact remove the subcontractor Reaume from the job site.

8. We cannot accept the argument of counsel for the complainant. The Act and the cases referred to in *Napev* deal with the notion of "requiring an employer to assign work to members of a particular union". In the present case no such requirement was ever made of either Reaume directly by the respondent Operating Engineers' union, nor indirectly through Armbro. In such circumstances, it is therefore clear that the condition precedent for the making of a complaint under section 91 has not been met.

9. One may be sympathetic to the plight of the complainant since the members of the complainant union were in fact removed from the job site. However, that they ceased to work on the job once Reaume's contract was cancelled by Armbro *does not by itself constitute a demand by the respondent Operating Engineers to Reaume* to employ members of the Operating Engineers' union. In the absence of such a request either directly or indirectly, this Board is without jurisdiction to hear a complaint under section 91 of the Act.

1380-81-R United Steelworkers of America, Applicant, v. Associated Tube Industries Ltd., Respondent.

Pre-Hearing Vote – Whether presence of management in vicinity of polling area causing direction of new vote – Whether fact that majority of employees foreign immigrants relevant – Whether encouragement by employer to exercise right to vote casting doubt on vote – Board stating preferred procedure in conduct of representation votes

BEFORE: R. D. Howe, Vice-Chairman, and Board Members J. D. Bell and O. Hodges.

APPEARANCES: *Brian Shell and Ken Signoretti for the applicant; D. W. Brady, Ian O'Connor and George McCrea for the respondent.*

DECISION OF R. D. HOWE, VICE-CHAIRMAN, AND BOARD MEMBER J. D. BELL;
December 17, 1981

1. This is an application for certification in which the Board, by decision dated October 7, 1981, directed that a pre-hearing representation vote be taken of the employees of the respondent in the following voting constituency:

“All employees of the Respondent, at its stainless steel tubes and tubular related parts facility, Woodbine Avenue, in the Regional Municipality of York, save and except foremen and supervisors, persons above the rank of foreman, supervisor, office and sales staff, Engineering and Technical staff including Production Control Staff, students employed during the school vacation period and students employed on a co-operative basis with a University or Community College.”

2. The pre-hearing representation vote was conducted on October 22, 1981. The report of the Returning Officer indicates that ballots were cast by 237 of the 251 employees on the voters' list; 135 ballots were marked against the applicant and 102 ballots were marked in favour of the applicant. The applicant requests that the Board set aside the results of that vote and direct that a further vote be taken.

3. On November 13, 1981, the Board heard the evidence of several witnesses and scheduled this matter for continuation of hearing on December 4, 1981. At approximately 9:30 a.m. (the time set for commencement of the continuation of hearing) on December 4th,

Mr. Shell, counsel for the applicant, approached Mr. Brady, counsel for the respondent, and requested time to seek instructions from an official of the respondent (Mr. Fitzpatrick). Counsel for the respondent was "prepared to grant a short adjournment". Mr. Shell then attempted to contact Mr. Fitzpatrick by telephone but was unable to do so. Unbeknownst to Mr. Brady or to this panel of the Board, Mr. Shell then proceeded to meet with a Board Officer with respect to another case scheduled for hearing that day, for which he was also counsel. Mr. Shell ultimately contacted Mr. Fitzpatrick about an hour later and was instructed to proceed with this case. When the continuation of hearing commenced at approximately 10:45 that morning, Mr. Shell apologized to the Board and to the representatives of the respondent for the delay that had been caused by the "breakdown in communication". He also noted that four separate cases involving the applicant had been scheduled for hearing that day and that he was required to serve as counsel on two of them due to a shortage of personnel. Mr. Brady submitted that an apology would not suffice and asked the Board to either dismiss the case or award costs against the applicant. After considering the submissions of the parties, the Board ruled that it was not prepared to dismiss the case and reserved its decision on the matter of costs in an effort to proceed with the matter as expeditiously as possible. It is questionable whether the Board has jurisdiction to award costs in circumstances such as these. However, assuming without deciding that we do have such jurisdiction, we are of the view that although Mr. Shell should have promptly apprized the Board and Mr. Brady of the difficulties that he was encountering in attempting to obtain instructions from Mr. Fitzpatrick, and should have sought leave of the Board before embarking upon extensive discussions involving another case, this is not, having regard to all of the circumstances, an appropriate case to award costs against the applicant.

4. The applicant contends that a further representation vote should be taken because of the presence of certain members of the respondent's management near the polling area at various times while the vote was being conducted on October 22, 1981. On the agreement of the parties, the vote was conducted in the plant stockroom from 7:00 to 9:00 a.m. and 3:00 to 5:00 p.m. A foreman's office is located directly across from the entrance to the stockroom. Ian O'Connor, the respondent's Personnel Manager and Safety Co-ordinator, was in that office for approximately one and one half hours while the vote was being conducted. He generally spends about an hour a day in that office. In addition to "sitting and standing" in the foreman's office, Mr. O'Connor also left the office "five or six times" while the vote was being conducted and stood in the corridor that separates the office from the stockroom, "observing" the activities in the area for a total of twelve to fifteen minutes. During that time he saw a number of employees approach the stockroom and enter it to cast their ballots. Mr. O'Connor did not discuss the vote or any other matters with any of the employees, although he "acknowledged" about half a dozen of them who "said hello". He described the location in which he stood as one of several places in the plant where he often stands. He also testified that it was not at all unusual for him to be talking to employees at that location, which is about twenty feet from the plant time clock and over forty feet from the polling booth.

5. Mr. O'Connor met with the Board's Returning Officer the day before the vote and showed him the polling location and facilities. At the request of the Returning Officer, he arranged for some additional security screening to be placed behind the polling booth. Mr. O'Connor usually arrives at the plant between 7:30 and 8:30 a.m. However, on the day of the vote he arrived at about 6:45 a.m. Mr. O'Connor told the Board that he came to the plant early that day because he was "the liaison between the Company and the polling officer concerning the location of the polling station, the location of the scrutineers' desk and the

voting arrangements.” Approximately five minutes before the poll opened Mr. O’Connor introduced the respondent’s scrutineer, Terry Lynn Vella, to the Returning Officer. Mr. O’Connor testified that he asked the Returning Officer where he should be during the voting procedure and was told: “be any place you like.” Mr. O’Connor then left the polling area and went to his office which is located a considerable distance from the stockroom.

6. Approximately five minutes after the poll opened (at 7:00 a.m.), Mr. O’Connor entered the foreman’s office across from the stockroom. It was Mr. O’Connor’s evidence that he went there to make sure that everything was running smoothly concerning the vote and to make sure that there was no disruption of normal business as a result of the vote. Shortly after the poll closed at 9:00 a.m., Mr. O’Connor went into the stockroom and left with the respondent’s scrutineer. He did not enter the stockroom again until shortly before the 5:00 p.m. final closing of the poll. There were no voters present at that time.

7. George McRae, the Vice-President and General Manager of the respondent, also came to the plant early on the day of the vote; he usually arrives between 8:15 and 8:45 but he arrived “about 7:20 or 7:30” that morning. He told the Board, “. . . as the senior officer of the Company at that location I thought that it was important that I be there and assure myself of the arrangements of the vote.” He also testified that he wished to ensure “that the employees and the Company were going to be presented with an equitable and democratic process.” When asked in cross-examination why it was necessary for him to be there, he replied that the vote was “a very important matter” and expressed his view that his Board of Directors would consider him “derelict” in his responsibilities if he were not there. After going to his own office which is located about five hundred feet away from the stockroom, Mr. McRae walked to the foreman’s office to “see how the vote was going” and “chatted with Mr. O’Connor and one of the foremen” for “ten or fifteen minutes”. From the foreman’s office he “could see people going into the stockroom” but “couldn’t see anything beyond that” since the entrance to the stockroom was about fifteen feet away but the polling booth, which was situated at the far end of the stockroom, was approximately fifty feet away.

8. During the morning voting session Mr. McRae walked up and down the main aisle of the plant twice. That aisle runs alongside the foreman’s office and the stockroom. It is separated from the stockroom by a “wire mesh” wall against which stock is piled on shelves. After casting their ballots, voters entered that aisle from an exit near the end of the stockroom at which the polling booth was situated. On one of his trips along the aisle that morning, Mr. McRae stopped near the stockroom exit “for a few minutes” at approximately 8:45 and, after noting that there were no voters in the polling station, walked into the stockroom. After asking the Returning Officer if everything was “O.K.” and receiving “an affirmative nod”, Mr. McRae left the area. He further testified that he purposely avoided going inside when there were people voting by making “a mental note” that he would return to the polling area at that time of the morning as he thought there would be no one there at the time. During the afternoon Mr. McRae did not enter the stockroom but was “in the area” along the main aisle of the plant for approximately five minutes. He testified that he “didn’t think there were any voters there” at the time although he conceded that “there might have been the odd person”. Mr. McRae told the Board that when he is not out of town, he generally goes through the plant “one, twice, or three times a day” and spends an average of half an hour per day in the plant.

9. Approximately a week before the vote, Mr. McRae caused the following letter to be distributed to employees on the respondent’s letterhead:

"TO: ALL EMPLOYEES

FURTHER TO OUR LETTER OF SEPTEMBER 30, 1981, THE LABOUR BOARD HAS ORDERED A *SECRET BALLOT VOTE* AT THE PLANT ON OCTOBER 22ND. THE OUTCOME OF THAT VOTE WILL DETERMINE WHETHER OR NOT THE UNITED STEELWORKERS OF AMERICA WILL BECOME YOUR SOLE AND EXCLUSIVE BARGAINING AGENT IN ALL MATTERS RELATING TO WAGES AND WORKING CONDITIONS BETWEEN YOU AND THE COMPANY. THE VOTE IS BY SECRET BALLOT AND NO ONE WILL KNOW HOW YOU VOTE. *YOU MAY VOTE FOR OR AGAINST THE UNION* WHETHER OR NOT YOU HAVE SIGNED A CARD AT ANY TIME IN SUPPORT OF THE APPLICATION.

YOU WILL ALL BE DIRECTLY AFFECTED BY THE OUTCOME OF THE VOTE. IF THE UNION BECOMES CERTIFIED AS YOUR BARGAINING AGENT IT WILL REPRESENT *ALL* EMPLOYEES IN THE BARGAINING UNIT AND NOT JUST THOSE EMPLOYEES WHO ARE UNION MEMBERS. YOU SHOULD BE AWARE THAT, IF CERTIFIED, THE UNION CAN REQUIRE THAT THE COMPANY DEDUCT AN AMOUNT EQUAL TO THE REGULAR UNION DUES FROM EACH BARGAINING UNIT EMPLOYEE WHETHER OR NOT THAT PERSON IS OR BECOMES A MEMBER OF THE UNION. STEELWORKERS' DUES AVERAGE 2 HOURS PAY PER MONTH.

YOU SHOULD ALSO BE AWARE OF THE FACT THAT THE UNION WILL BE CERTIFIED IF IT OBTAINS MORE THAN 50% SUPPORT OF THOSE EMPLOYEES *ACTUALLY CASTING BALLOTS* ON OCTOBER 22ND. IF YOU DO NOT EXERCISE YOUR RIGHT TO VOTE THE OUTCOME CAN BE DETERMINED BY A SMALL MINORITY OF EMPLOYEES ALL OF WHOM WILL BE DIRECTLY AFFECTED. WE ASK YOU TO AGAIN, THEREFORE, CONSIDER 'BOTH SIDES OF THE COIN' PRIOR TO EXERCISING YOUR RIGHT TO VOTE.

SINCERELY,
(signed) "G. D. McRae"
G. D. MCRAE
VICE PRESIDENT & GENERAL MANAGER

OCTOBER 15, 1981"

Mr. McRae testified in cross-examination that in the last paragraph of that letter he was suggesting that employees "exercise their franchise". He also candidly stated that he was concerned about voter turn-out.

10. On the day of the vote no one complained to the Returning Officer concerning the

presence of Mr. O'Connor or Mr. McRae, although Steven Sparkes, who served as a scrutineer for the applicant from 3:45 to 5:00 p.m., approached the Returning Officer shortly after the poll opened in the morning, asked "how to go about making a complaint", and stated that if it was a "no vote" he intended to do so. The Returning Officer explained that after the vote had been counted, a notice would be posted on the bulletin board with instructions concerning the procedure for sending to the Board a statement of desire to make representations in connection with the vote. Mr. Sparkes repeated his question to the Returning Officer twice more that day but never gave any indication whatever of the nature of his complaint until he sent a statement of desire to the Board on October 23, 1981.

11. In support of his conviction that a new vote should be directed in this matter, Mr. Sparkes testified: "A lot of the employees there are different nationalities — Pakistani, Italian, Yugoslavian, Latin American Some don't speak English very well. Some of them have been there a long time. Due to their different backgrounds and personalities and them not speaking English, I thought they could have been influenced by Mr. O'Connor's and Mr. McRae's presence" In cross-examination Mr. Sparkes confirmed that his "basic concern" was the possible intimidation of immigrant employees by the presence of Mr. O'Connor and Mr. McRae in the area of the polling station. Although counsel for the applicant alleged in his statement of desire with respect to this matter that the "voting constituency is made up of Italian, Yugoslavian, Pakistan, Jamaican, Trinidadian, Latin American and Anglo-Saxon" voters, in arguing the case he did not contend that this fact should cause the Board to apply a different standard in considering the validity of the vote.

12. The Board's experience and practice in regards to such matters is set forth as follows in *Dylex Limited*, [1977] OLRB Rep. June 357, at paragraph 5 (application for judicial review dismissed: (1977), 81 D.L.R. (3d) 555 (Div. Ct.):

"Related to the question of the admissibility of expert testimony concerning the possible influence of the respondent's pre-vote propaganda on immigrant employees was the applicant's strongly argued contention that in determining whether or not the respondent used undue influence contrary to section 56 [now section 64] of the Act, and as to whether or not the applicant should be certified pursuant to section 7a [now section 8], the Board should take into account the fact that many of the bargaining unit's employees were immigrants to Canada. It was counsel's contention that such persons were more likely to have been influenced by the respondent's propaganda than would non-immigrant employees. This is a proposition with which we are unable to agree. The Board is called upon with ever increasing frequency to concern itself with bargaining units comprised of a greater or lesser extent of fairly recent immigrants to Canada and it is not uncommon to have such persons testify for one reason or another before the Board. Our experience in this regard has taught us that employees who are immigrants are not, only because they are immigrants, somehow more easily influenced or more incapable of making their own decisions than are other employees. Some individuals appear to be possessed of greater fortitude than do others. Similarly there are some individuals who by their very nature may be easily influenced and who tend to perceive threats in circumstances where most others would not. However, these are reactions which appear to be

based on individual temperament and character rather than on any general characteristics of language or former country of residence. This being the case we are of the view that no inferences can be drawn as to the possible susceptibility of influence of employees in the bargaining unit on the grounds only that many of them immigrants from abroad."

Although that case dealt with the effect of employer pre-vote propaganda, the rationale set forth in that case is equally applicable to actions taken by the employer during the balloting.

13. As indicated by the Board in *Scarborough Centenary Hospital Association*, [1979] OLRB Rep. Apr. 350, at paragraph 4, "[i]n assessing the conduct of the parties during the taking of a representation vote the Board is concerned that such conduct not have destroyed the secrecy of the ballot or have created a situation where the vote was not likely to disclose the true wishes of the employees." See also *Anderson Metal Industries*, [1981] OLRB Rep. Apr. 415, in which the Board stated (at paragraph 9):

"In deciding whether to exercise its discretion under section 92(5) to direct a further representation vote, the Board's concern is whether it can rely on the vote taken on January 30, 1981 as representing the true wishes of the employees. As stated in *Armoured Floor Company Limited*, [1981] OLRB Sept. 793, at paragraph 5, 'the Board has indicated the kind of climate which it considers suitable for the exercise of an individual employee's personal choice in casting his vote in *Volverine Tube Division of Calumet and Hecla of Canada Ltd.* 63 CLLC ¶ 12,296 at 1228 wherein it refers to *Rogers Majestic Limited* D.L.S. 7-1382 as follows:

'Its primary object is to ensure that, so far as possible, the vote will be conducted in an atmosphere of calm and that the employees who are to participate in the vote shall not be subjected to partisan pressures and influences as the voting day approaches. The Board's view has always been that at that point the individual employees should be left free to make a purely personal decision as to how he should vote.'

(See also *The Great Canadian Pizza Company (Division of 401825 Ontario Limited)*, [1980] OLRB Feb. 216; *Constellation Hotel Corp. Ltd.*, [1974] OLRB Rep. Nov. 799; and *Zehr's Markets Limited*, [1971] OLRB Rep. Oct. 638.)

14. Counsel for the applicant urged the Board to abandon that well established approach to such matters and adopt a "wider" and "less stringent" test to assure not only that representation votes are in fact fair, but also that they are seen (presumably by all affected employees) to be fair. However, as a matter of labour relations policy, the Board is of the view that the approach that it has developed over the years in its jurisprudence reflects a proper balance between the need for representation votes that can be relied upon with confidence as representing the true wishes of the employees, and the need for certainty and finality in representation votes. That is not to say that the appearance of fairness is irrelevant. The Board's case law indicates that employee perceptions concerning the conduct of a representation vote are one of the factors to be considered along with all of the other pertinent circumstances in determining whether a particular representation vote was unlikely to disclose the

true wishes of the employees. For example, in *The Great Canadian Pizza Company, supra*, the polling area seating arrangements (insisted upon by the owner of the Company) placed the owner, who served as the employer's scrutineer, "side by side" with the Returning Officer while the union's scrutineer "ended up being seated in an area of the office removed from the specific point where the ballot box, the Board's officer and the other scrutineers were situated." In its decision directing a new vote, the Board stated: "This would cause employees to have an imbalanced perception of the conduct of the vote, and bearing in mind the juxtaposition of [the owner] and the Board's officer, side by side, might raise doubts in employees' minds as to the very secrecy of the ballot itself." (A further circumstance considered by the Board was the fact that the owner "whom the employees encountered eye to eye as they came in to receive their ballot, and as they would be returning to place it into the ballot box" had previously commented to certain bargaining unit employees that supporters of the union would be fired.)

15. It is preferable that all persons, including union officials and members of management, who are not directly involved with the conduct of a representation vote absent themselves from the vicinity of the polling area while the vote is being conducted in order to remove the temptation to engage in electioneering and propagandizing, and to eliminate any possible objection to the validity of the vote on the basis of their presence. The presence of such persons in that vicinity during the course of the vote is a factor that must be considered by the Board in the light of all of the other relevant circumstances, in determining whether another vote should be directed. Thus, in the *Zehr's Market* case, *supra*, the congregation of "up to seven" management personnel in the area immediately adjacent to the polling booths was found by the Board to be a circumstance that would tend to bring pressure on the employees who entered the booths to cast their ballots, in the context of a situation in which the employer had clearly indicated to the employees its opposition to the applicant union and had, within the week before the vote, superimposed an alternate choice of an employee association that it had informed employees it would be willing to recognize. Similarly, in *Constellation Hotel Corporation Limited*, [1974] OLRB Rep. Nov. 799, "the presence of management personnel in a strategic location in the vicinity of the polling area in full view of the employees as they proceeded towards the ballot box" was one of the circumstances which persuaded the Board to direct that a further representation vote be taken. However, other relevant circumstances included the visible "ticking off" of employee names on a list held by one of the members of management in question, a "shouting match" that subsequently developed in the vicinity of the polling area between those members of management and an organizer employed by the applicant union, the "cloak and dagger" scenario during which officials of the union and the employer surveyed each other's activities on the employer's premises, and the presence as scrutineers of relatively high ranking officials on behalf of both the union and the employer.

16. Although the Board prefers that all persons not directly involved with the conduct of the vote absent themselves from the vicinity of the polling area while the vote is being conducted, that is not an absolute requirement. The Board has held in a number of cases that the mere presence of extraneous representatives of one of the parties in or near the polling area will not by itself inevitably lead the Board to conclude that a situation has been created wherein the vote is not likely to disclose the true wishes of the employees; see, for example, *Neelon Steel Limited*, [1965] OLRB Rep. Nov. 548; and *Hostess Food Products Limited*, [1975] OLRB Rep. March 218. Further guidance concerning the approach that the Board applies in situations involving mere presence of a member of management in or near the polling area is provided by *Scarborough Centenary Hospital Association, supra*. In that case, the respondent's personnel director (Mr. Levis) served as the respondent's scrutineer during

the first voting period. In ruling that this circumstance did not constitute sufficient grounds for directing a new vote, the Board stated (at paragraph 11):

“In the instant case the respondent’s personnel manager was present at the poll when at least four, and possibly more, of the employees who voted cast ballots. However, there were no other incidents prior to or during the conduct of the vote which might give special significance to this fact. Further, the applicant itself did not utilize a rank-and-file employee as a scrutineer. During all of the voting period Mrs. Bowman, the applicant’s executive director, acted as its scrutineer. Taking these factors into account we do not believe that Mr. Levis’ presence in the voting area for part of the time that the vote was being conducted would have likely unduly influenced employees such that they could not express their true wishes in the vote. Consequently we do not regard that as sufficient grounds for setting aside the results of the pre-hearing representation vote.”

17. It was submitted on behalf of the applicant that the presence of Mr. O’Connor and Mr. McRae was intended to ensure that a large number of employees would vote. Counsel further submitted that, regardless of their intent, the presence of those two members of management may have had the effect of causing some employees to vote who might otherwise not have done so. When this proposition was put to them during cross-examination, both Mr. O’Connor and Mr. McRae firmly denied that this was their intent. It is unnecessary for the Board to determine the matter of intent as it is not the individuals’ intent that is relevant to the Board’s determination, but rather the probable effect of the actions in question. There is no evidence before the Board that any employee was prompted by the presence of Mr. McRae or Mr. O’Connor to cast a ballot which he would not otherwise have cast. Indeed there is no evidence that any employee other than Mr. Sparkes even saw Mr. McRae near the polling area. Although it is clear that more than half a dozen employees saw Mr. O’Connor standing outside the foreman’s office while they were entering the polling area, there is no evidence that those employees told any other employees of his presence. In view of the credible evidence of Mr. O’Connor that it was not unusual for employees to see him standing in that location, we are not prepared to infer that the employees would have found his presence to be in any way remarkable. Accordingly, in the absence of evidence that Mr. O’Connor or Mr. McRae made any statements to employees that could be construed as electioneering or propagandizing, and in the absence of evidence of unfair labour practices committed by management during the applicant’s organizing campaign or other circumstances from which it could reasonably be inferred that their presence would likely have influenced voters, the Board is not prepared to find in the circumstances of this case that their mere presence prevented the employees from indicating their true wishes or caused any employees to cast ballots that they would not otherwise have cast.

18. Moreover, it is doubtful that either tacit or express encouragement by management (or any other party) of voting by employees would by itself constitute a basis for directing a new vote. In *Kilgoran Hotels*, [1975] OLRB Rep. May 431, the union’s scrutineer (Mrs. Hall) left the voting station “to round up” certain employees who “may not have known where to vote was held”. At paragraph 7 of that decision, the Board stated:

“The Board dismissed the respondent’s initial submission at the hearing

that the right *not* to vote is a precious right that was usurped by the activities of Mrs. Hall because the refusal by an employee to vote is in effect a ballot cast in the respondent's favour. Counsel conceded the futility of the argument however when it was pointed out that under section 49(4) [now section 57(4), which is the "termination of bargaining rights" equivalent to section 7(3) in the certification context] of the Act only ballots *cast* are relevant with respect to the ultimate disposition of a representation vote directed under *The Labour Relations Act*."

A further authority on this point is *Scarborough Centenary Hospital Association, supra*. In that case the Hospital's personnel director stopped to talk to a group of employees a few minutes before the poll was scheduled to reopen. During that conversation he "urged those in the group to vote and added that they should also encourage other employees to vote"; however, nothing was said by the personnel director as to whether those present should vote for or against the union. In rejecting the union's contention that the vote should be set aside on the basis of that conversation, the Board stated (at paragraph 4):

"In assessing the conduct of the parties during the taking of a representation vote the Board is concerned that such conduct not have destroyed the secrecy of the ballot or have created a situation where the vote was not likely to disclose the true wishes of the employees. In the instant case we are satisfied that Mr. Levis' comments to the group of employees would not likely have produced either of these results. Accordingly we do not regard his comments as a basis for setting aside the results of the pre-hearing representation vote."

Therefore, since direct management encouragement of employees to vote does not by itself provide a basis for setting aside the vote, it is not evident to the Board that the indirect encouragement which is alleged to have occurred in the present case should lead to a different result. In any event, the Board is not satisfied on the balance of probabilities that the presence of Mr. O'Connor and Mr. McRae in the vicinity of the voting area in the circumstances of this case caused employees to vote who would not otherwise have done so. As Board Member Bell observed during the hearing to this matter, it is by no means unusual in the Board's experience for ballots to be cast in a representation vote by more than 90% of the employees of the voters' list.

19. Having regard to all of the evidence and the submissions of the parties, the Board is of the view that it has not been established that the impugned conduct of Mr. O'Connor and Mr. McRae destroyed the secrecy of the ballot or created a situation in which the representation vote in question would be unlikely to disclose the true wishes of the employees. Accordingly, the Board, in the exercise of its discretion under section 103(5) of the Act, declines to direct that a further representation vote be taken in this matter.

20. Since not more than fifty percent of the ballots cast in the pre-hearing representation vote in this matter were in favour of the applicant, this application is hereby dismissed.

21. The Board will not entertain an application for certification by the applicant with respect to any of the employees of the respondent in the aforementioned voting constituency within the period of six months from the date hereof.

22. The Registrar will destroy the ballots cast in the pre-hearing representation vote taken in this matter following the expiration of thirty days from the date of this decision unless a statement requesting that the ballots should not be destroyed is received by the Board from one of the parties before the expiration of such thirty day period.

DECISION OF BOARD MEMBER O. HODGES;

1. I dissent.

2. A new vote would be a reasonable accommodation of the Preamble of the *Labour Relations Act*.

“WHEREAS it is in the public interest of the Province of Ontario to further harmonious relations between employers and employees by encouraging the practice and procedure of collective bargaining between employers and trade unions as the freely designated representatives of employees.”

While there is no evidence of overt anti-union animus by the respondent employer shown against any employee, the Vice-President and General Manager in a letter to employees strongly urges all employees to vote because otherwise the trade union could be certified. Horrors! And if that happened, why, everyone might have to pay union dues. What a dreadful prospect!

3. Mr. O'Connor has worked at the plant for 24 years. For 12 years he has been Personnel and Safety Co-ordinator. Obviously he would be well known to employees personally. He could only be seen as being in support of the position expressed by Mr. McRae to the employees in his personal letter a week before the vote. So what is he doing in the vicinity of the polling place when voting is in progress? Why, just there to prevent disruption as a result of the voting! Certainly *not* to remind employees by his presence that if they vote “NO” the company will be pleased and no union dues will have to be paid by workers.

4. The applicant does not contest the secrecy of the vote, but only that the respondent should not have the advantage of an anti-union presence in the crucial area of the polling place. Fairness in the essence of this application.

5. O'Connor testified that he asked the Board's Returning Officer where he should be during the voting and was told: “Be anywhere you like”. This panel of the Board is unanimous in its opinion that it would be preferable for persons not directly involved with the conduct of a representation vote to absent themselves from the vicinity of the polling area while the vote is being conducted in order to remove the temptation to engage in electioneering and propagandizing (para. 15 of the majority award). Perhaps this opinion should be emphasized when Board Returning Officers instruct the parties in preparation for a vote.

6. Emphasis on Board procedures in matters of this kind would be served were a new vote to be ordered. The true wishes of employees in selecting their bargaining agent in a representation vote must not be impeded, influenced, or interfered with in any way that is or appears to be unfair. Considering all of the evidence I find that a new representation vote should be ordered, with clear Board instructions that the polling area be cleared of the officials of all parties who are not required to participate in the conduct of the vote.

1263-81-OH Brenda E. Beattie, Complainant, v. Auto Jobbers Warehouse Ltd., Respondent.

Health and Safety – Practice and Procedure – Refusal to drive truck – Whether employee reasonably believed truck unsafe -- Whether continuing to have reasonable cause to believe after inspector's report – Whether lay-off and discharge of employee because of her exercising rights under Act – Whether delay in filing complaint causing Board to dismiss – Whether delay affecting quantum of compensation

BEFORE: Ian Springate, Vice-Chairman, and Board Members J. A. Ronson and S. Cooke.

APPEARANCES: *Brenda E. Beattie for the complainant; Jacobus P. Vandenberg for the respondent.*

DECISION OF IAN SPRINGATE, VICE-CHAIRMAN, AND BOARD MEMBER S. COOKE; December 29, 1981

1. This is a complaint under section 24 of the *Occupational Health and Safety Act* in which Miss Brenda Beattie alleges that she was laid off and then dismissed from her job as a driver with the respondent because she refused to drive an unsafe vehicle.

2. The respondent is an auto-parts wholesaler. Miss Beattie started with the company in June or July of 1980. On May 25, 1981, when Miss Beattie returned to work after a four week absence caused by a back problem, she was assigned to drive an old pick-up truck which she had apparently never driven before. It should be noted that Miss Beattie is an experienced driver, and had driven other company vehicles. On this occasion Miss Beattie experienced some difficulty in figuring out how the vehicle's windshield wipers worked, and accordingly was instructed on their use by Mr. J. P. Vandenberg, a part owner of the respondent.

3. Miss Beattie testified that later that same day, while she was driving along Provincial Highway 401, it started to rain and she could not get the windshield wipers to start. According to Miss Beattie, she decided to pull over to the side of the road, but in doing so she had to pump the brakes a number of times before the vehicle came to a halt.

4. Miss Beattie testified that after she stopped the vehicle she managed to get the windshield wipers started and that she then proceeded to her first stop of the day. According to Miss Beattie, while she was driving along the road, the windshield wipers again stopped working, and accordingly she phoned Mr. A. Seaton, who works on the respondent's order desk. Mr. Seaton indicated that Miss Beattie should finish her run, but take it easy. In the meantime, it had stopped raining. Miss Beattie stated that she finished her run that day, but that she did so very slowly because of her concern about the brakes. From Miss Beattie's testimony it appears that she did not actually experience any additional problems with the brakes.

5. When Miss Beattie returned to the respondent's premises she advised Mr. Vandenberg of what had occurred. She told Mr. Vandenberg that she regarded the vehicle as unsafe, and that while she would drive it for short distances, she would not take it out on the highway. Mr. Vandenberg in return indicated that if Miss Beattie persisted in this attitude she would have to be laid-off in that the respondent had no other vehicle for her to drive. Miss Beattie

reiterated her position, and accordingly Mr. Vandenberg laid her off. It might be noted that at the relevant time the respondent employed a number of other drivers who had been employed for shorter periods than had Miss Beattie, and that it also employed a summer student as a driver.

6. Mr. Vandenberg, who is a licenced mechanic, testified that shortly after Miss Beattie's return, he checked out all of her complaints, and found the vehicle to be in order. Initially Mr. Vandenberg stated that this check had been done in Miss Beattie's presence, but subsequently, he indicated that although he was certain he had done the check, he was not certain that Miss Beattie had actually been present at the time. For her part, Miss Beattie testified that at no time on May 25th did Mr. Vandenberg inspect the vehicle in her presence. In the circumstances, we accept that Miss Beattie was not present at the time Mr. Vandenberg checked the vehicle.

7. We found both Mr. Vandenberg and Miss Beattie to be credible witnesses. We accept that Mr. Vandenberg believed the vehicle to be safe. However, we also accept that Miss Beattie honestly believed that the vehicle was not safe. Based upon her difficulties with windshield wipers and, more importantly, the problems she encountered with the vehicle's brakes on May 25th, we are satisfied that she had reasonable grounds to this belief.

8. As soon as Miss Beattie arrived home on May 25, 1981 she telephoned what she referred to as "the labour board of safety", which was presumably the Ministry of Labour's Occupational Health and Safety Division. Four days later, on May 29th, a health and safety inspector convened a meeting at the respondent's premises attended by Mr. Vandenberg, Miss Beattie and Ms. Brenda Fell, another employee of the respondent, who, subsequent to Miss Beattie's lay-off, had been driving the vehicle in question. It should be noted that Ms. Fell did not testify, and accordingly the Board does not have any evidence as to her experience with the vehicle. At the meeting, the inspector asked Miss Beattie if she still refused to drive the vehicle, to which she replied that she would not drive it on the highway. The inspector asked a number of questions about the truck, and then indicated that he had no authority to check the vehicle himself. It is not disputed that in Miss Beattie's presence the inspector did not "test drive" the vehicle or in any other way check the brakes and also that he did not try the windshield wipers to ensure that they were working properly. Mr. Vandenberg testified that after Miss Beattie left, the inspector did take a look at the vehicle and indicated he felt it was safe.

9. Subsequent to the meeting convened by the inspector, the inspector issued a report in which he recounted Miss Beattie's concerns about the brakes and windshield wipers, noted that Ms. Fell had continued to operate the vehicle and referred to Miss Beattie's continuing refusal to drive the vehicle on the highway. The report then stated "No contraventions of the Act were noted". A copy of the report was mailed to Miss Beattie. There is nothing in the report to indicate that its conclusion was based on anything other than the investigation which Miss Beattie herself had witnessed.

10. A couple of times after the meeting with the inspector, Miss Beattie telephoned Mr. Vandenberg about her job. Mr. Vandenberg indicated that her lay-off would be only temporary until the respondent acquired a new vehicle. Thirteen weeks after her lay-off, the respondent forwarded to Miss Beattie her termination pay as required under *The Employment Standards Act*. Mr. Vandenberg indicated that the vehicle in question developed trans-

mission problems in July, 1981 after which it ceased to be operated at all. Mr. Vandenberg testified that the company acquired a replacement vehicle in August, but since Miss Beattie had already been given her severance pay she was not recalled. As we have already noted, throughout this period the respondent retained in its employ a summer student and other drivers with less service than Miss Beattie.

11. The right of a worker to refuse work, as well as the procedure which should be followed in such circumstances, are set out in section 23 of the Act. The relevant portions of section 23, along with the protections contained in section 24 for an employee who refuses to do work he or she reasonably believes to be unsafe are set out below:

“23.-(3) A worker may refuse to work or do particular work where he has reason to believe that,

- (a) any equipment, machine, device or thing he is to use or operate is likely to endanger himself or another worker;
- (b) the physical condition of the work place or the part thereof in which he works or is to work is likely to endanger himself; or
- (c) any equipment, machine, device or thing he is to use or operate or the physical condition of the work place or the part thereof in which he works or is to work is in contravention of this Act or the regulations and such contravention is likely to endanger himself or another worker.

(4) Upon refusing to work or do particular work, the worker shall promptly report the circumstances of his refusal to his employer or supervisor who shall forthwith investigate the report in the presence of the worker and, if there is such, in the presence of one of,

- (a) a committee member who represents workers, if any;
- (b) a health and safety representative, if any; or
- (c) a worker who because of his knowledge, experience and training is selected by a trade union that represents the worker, or if there is no trade union, is selected by the workers to represent them,

who shall be made available and who shall attend without delay.

(5) Until the investigation is completed, the worker shall remain in a safe place near his work station.

(6) Where, following the investigation or any steps taken to deal with the circumstances that caused the worker to refuse to work or do particular work, the worker has reasonable grounds to believe that,

- (a) the equipment, machine, device or thing that was the cause of his refusal to work or do particular work continues to be likely to endanger himself or another worker;
- (b) the physical condition of the work place or the part thereof in which he works continues to be likely to endanger himself, or
- (c) any equipment, machine, device or thing he is to use or operate or the physical condition of the work place or the part thereof in which he works or is to work is in contravention of this Act or the regulations and such contravention continues to be likely to endanger himself or another worker,

the worker may refuse to work or do the particular work and the employer or the worker or a person on behalf of the employer or worker shall cause an inspector to be notified thereof.

(7) An inspector shall investigate the refusal to work in the presence of the employer or a person representing the employer, the worker, and if there is such, the person mentioned in clause a, b or c of subsection 4.

(8) The inspector shall, following the investigation referred to in subsection 7, decide whether the machine, device, thing or the work place or part thereof is likely to endanger the worker or another person.

(9) The inspector shall give his decision, in writing, as soon as is practicable, to the employer, the worker, and, if there is such, the person mentioned in clause a, b or c of subsection 4.

(10) Pending the investigation and decision of the inspector, the worker shall remain at a safe place near his work station during his normal working hours unless the employer, subject to the provisions of a collective agreement, if any,

- (a) assigns the worker reasonable alternative work during such hours; or
- (b) subject to section 24, where an assignment of reasonable alternative work is not practicable, gives other directions to the worker.

(11) Pending the investigation and decision of the inspector, no worker shall be assigned to use or operate the equipment, machine, device or thing or to work in the work place or the part thereof which is being investigated unless the worker to be assigned has been advised of the refusal by another worker and the reason therefor.

(12) The time spent by a person mentioned in clause a, b or c of sub-

section 4 in carrying out his duties under subsections 4 and 7, shall be deemed to be work time for which the person shall be paid by his employer at his regular or premium rate as may be proper.”

“24.-(1) No employer or person acting on behalf of an employer shall,

- (a) dismiss or threaten to dismiss a worker;
- (b) discipline or suspend or threaten to discipline or suspend a worker;
- (c) impose any penalty upon a worker; or
- (d) intimidate or coerce a worker,

because the worker has acted in compliance with this Act or the regulations or an order made thereunder or has sought the enforcement of this Act or the regulations.

(2) Where a worker complains that an employer or person acting on behalf of an employer has contravened subsection 1, the worker may either have the matter dealt with by final and binding settlement by arbitration under a collective agreement, if any, or file a complaint with the Ontario Labour Relations Board in which case any regulations governing the practice and procedure of the Board apply, with all necessary modifications, to the complaint.”

12. Miss Beattie testified that she refused to drive the vehicle on the highway because it was not safe. Although she did not expressly say so, in the circumstances we feel it reasonable to conclude that she believed that to operate the vehicle on the highway would likely endanger herself. Because of her difficulties with the vehicle on May 25, 1981, particularly with the brakes, we are also satisfied that it was reasonable for Miss Beattie to have this belief. Accordingly, we are of the view that Miss Beattie had the right under section 23(3) of the Act to refuse to drive the vehicle on the highway. Miss Beattie completed her duties with the vehicle on May 25th and then advised her employer of her decision. Under section 23(4) of the Act, it was up to the respondent at that time to investigate the matter in the presence of Miss Beattie. If Mr. Vandenberg, a licenced mechanic, had inspected the vehicle in the presence of Miss Beattie, and found it to be safe and so advised her, then perhaps she might have changed her mind about driving the vehicle. If she had not changed her mind, then the inspection might have called into question the reasonableness of Miss Beattie's refusal to drive the vehicle. However, Miss Beattie was laid-off without an official of the respondent conducting such an inspection or investigation in her presence. In these circumstances, we are satisfied that Miss Beattie was laid-off contrary to section 23(3) of the Act for exercising her right to refuse to operate equipment which she had reason to believe was likely to endanger herself.

13. This then brings us to the issue of Miss Beattie's continuing refusal to drive the vehicle even after the inspector had arrived on the scene. Generally, one would expect that the report of an inspector would settle a matter such as this. If the report of an inspector indicates that certain equipment is unsafe to operate, then one would assume that the employee would

be entitled under the Act to continue to refuse to operate it until the problems noted by the inspector had been corrected. On the other hand, should the inspector, after an investigation, conclude that the equipment is safe to operate, then it will be much more difficult for an employee to claim that he or she still had a reasonable belief that it would be unsafe to do so. As the Board noted in the *Canadian Gypsum Construction* case [1978] OLRB Rep. Oct. 897, an employee who refuses to work in the face of an investigation and a decision by a neutral expert that the work is safe, "must meet the substantial onus of establishing that he has reasonable cause to believe otherwise and is entitled to the protections of the Act". In the instant case, however, the inspector failed to carry on any meaningful investigation in Miss Beattie's presence. Instead, he indicated that he had no authority to check the vehicle and did not do so. Further, he neither arranged for an inspector qualified in vehicle maintenance to replace him, nor did he seek the assistance of a mechanic. Miss Beattie had reasonable cause to believe the vehicle unsafe to drive prior to the inspector's arrival, and nothing that occurred during the inspector's visit while Miss Beattie was present would have made such a belief any less reasonable. Accordingly, we are of the view that Miss Beattie continued to have a reasonable belief that to operate the vehicle would likely endanger herself, and that therefore, she had a legal right to continue in her refusal to drive it on the highway.

14. We would stress at this point that we make no finding as to whether or not the vehicle was in fact unsafe to operate. The Act gives employees the right to refuse to operate equipment they have reason to believe is likely to endanger themselves. Because of her experiences with the vehicle on May 25, 1981, Miss Beattie had reason to believe that operating the vehicle would endanger herself. Subsequent events did not make this belief on her part any less reasonable. Accordingly, at all relevant times she was within her legal rights to refuse to operate the vehicle.

15. Notwithstanding the fact that Miss Beattie had a right to continue to refuse to drive the vehicle, the respondent did not recall her, even after it acquired a replacement vehicle. Instead, the respondent dismissed her. We are satisfied that this dismissal was due to Miss Beattie having acted in compliance with section 23(3) of the Act, and that accordingly her dismissal was in violation of section 23(1).

16. Miss Beattie was originally laid off on May 25, 1981, and the inspector carried on his investigation on May 29, 1981. Notwithstanding this, the instant complaint was not filed until September 8, 1981, some 15 weeks later. Had Miss Beattie filed her complaint in a more timely manner, a remedial order, including an order of reinstatement, could have been made at a much earlier date and thereby limited the possible liability of the respondent. We are satisfied that the delay in filing the complaint should not be a bar to a remedial order, but that some adjustment in compensation should be made so as to ensure that Miss Beattie's delay in filing does not unduly prejudice the respondent. We recognize that in deciding whether or not to file a complaint a party needs time in which to consider the relevant facts and to weigh the reasonable chances of success. In certain instances this may entail the interviewing of witnesses and the gathering of evidence. Because each case is different, the Board does not pretend to set a fixed guideline with respect to what is a reasonable time for an aggrieved party to initiate proceedings after an alleged violation of the Act. See, *Decor Wood Specialists*, [1974] OLRB Rep. March 137. However, in the instant case, we believe it would have been reasonable for Miss Beattie to have filed her complaint no later than July 1, 1981, and that the respondent should not be required to compensate her for the following period of delay.

17. At the hearing, Miss Beattie indicated that she had commenced alternate employ-

ment on September 28, 1981, and as a result did not desire to return to the respondent's employ. Accordingly, there will be no order of reinstatement. However, we are satisfied that Miss Beattie should be compensated from the period of her lay-off on May 25, 1981, to her re-employment of September 28, 1981, less the period covered by the unreasonable delay in filing the complaint. Accordingly, the Board directs that the respondent compensate Miss Beattie for her loss of earnings calculated on the basis of an eight week period, plus interest on the amount. Interest is to be calculated in accord with the Board's practice note number 13, (which is to be found in the Board's published reports for the month of September, 1980) modified so as not to require the payment of interest for the period during which Miss Beattie unduly delayed the filing of her complaint. The Board will remain seized of this matter in the event there is any disagreement as to the actual amount payable to Miss Beattie.

DECISION OF BOARD MEMBER JAMES A. RONSON;

1. I agree with the facts as found and the remedy imposed by the Vice-Chairman, but wish to comment further.

2. A copy of the inspector's report was filed with the Board and it reads as follows:

"This Code U inspection was carried out in conjunction with a refusal to work investigation. The refusal was by worker Ms. Brenda Beattie and occurred at about 13:15 hours, 25/05/81. The basis of the refusal involved Ford Courier pick up truck Lic. #DL5-572 which Ms. Beattie drove on the day of May 25, 1981 and regarding defective brakes and windshield wipers.

The investigation was conducted with Mr. Vandenberg, Ms. Beattie and Ms. Brenda Fell present. Ms. Fell operated the vehicle after Ms. Beattie's refusal with knowledge of the refusal and the reasons.

It was established at the start of the investigation that only one refusal had occurred, the second refusal was obtained with the above contacts present. Ms. Beattie stated she would be prepared to drive the vehicle locally, but not on the highway. No contraventions of the Act were noted. A copy of this report shall be given to Ms. Beattie."

3. Following her refusal, Ms. Beattie was laid off by the respondent employer. The employer tendered no evidence that an assignment of reasonable alternative work was not practicable.

4. On the evidence before us, I have no hesitation in finding that the vehicle was safe to operate on the day of the inspection. No doubt the employer will wonder what more it had to do when an inspector issues a report that says "no contraventions of the Act were noted". But employers must be made aware that the wording of the *Occupational Health and Safety Act* does not allow them complete protection behind the report of an inspector.

5. As the Vice-Chairman stated "one would expect that the report of an inspector would settle a matter such as this". If, as in this case, there is no meaningful inspection as contemplated by the Act and reasonable belief of the employee remains unchanged, the Act dictates that the employer must suffer the consequences.

1561-80-U Canada Cement Lafarge Ltd., Complainant, v. United Cement, Lime & Gypsum Workers International Union and its Local 368, Respondents.

Damages – Duty to Bargain in Good Faith – Whether finding of bad faith bargaining necessarily resulting in damage award – Whether union must compensate employer for security and truck rental expenses incurred during strike – Whether union responsible for loss caused by violence at picket line – Relevance of participation in violence of union official – Board discussing application of damages principles to labour relations context

BEFORE: George W. Adams, Chairman and Board Members J. D. Bell and B. L. Armstrong.

APPEARANCES: *F. G. Hamilton for the complainant; and Paul J. J. Cavalluzzo and Martin L. Levinson for the respondents.*

DECISION OF THE CHAIRMAN; December 7, 1981

1. By decision dated November 18, 1980, the Board declared that the United Cement, Lime & Gypsum Workers International Union and its Local 368 (hereinafter referred to as the “International” and “Local 368”) were required to submit to the results of a section 40 vote held on Thursday, October 16, 1980 and that they had failed to bargain in good faith and make every reasonable effort to enter into a collective agreement by refusing to execute a collective agreement presented by Canada Cement Lafarge Ltd. (hereinafter referred to as “CCL”) on October 17, 1980. The Board directed both trade unions to execute the agreement and requested the Registrar to reschedule the case for hearing on the issue of damages. In the last paragraph of its decision the Board wrote:

... We have found that both trade unions have violated section 14 and it is now firmly established that a breach of this section may support a request for all resulting damages. However, in this particular case the trade unions did not execute the proposed collective agreement because of a dispute over the legal effect of [section 40] section 34e (an issue of first impression) and because they did not believe the vote reflected the true wishes of the employees. The latter concern was the product of a last minute controversial statement by the respondent and this decision now puts that concern aside. It is also not readily apparent that both trade unions should be equally liable and from when damages should run, if damages are appropriate in this situation.

At the outset of the hearing into these issues, the trade unions asked the Board to determine first whether compensation is ever an appropriate remedy in the context of a section 40 vote. The Board refused this motion and, thus, most of the evidence received by the Board and reviewed below relates to damage assessment. However, we have summarized, in the next two paragraphs, many of the earlier findings of the Board pertinent to the preliminary issue raised by the unions. These two paragraphs also provide a useful review of the background to this decision.

2. The Board’s November 18th, 1980 decision noted that the last offer vote was held on Thursday, October 16, 1980 in Woodstock and that CCL held a press conference in Wood-

stock at 10:00 a.m. on that same date where its President read a text setting out the company's views. The last paragraph of the text read:

A positive vote could signal the return to work of the employees involved immediately. A negative vote could, at best, see this plant closed for many months, at worst, closed forever.

The Board noted that at no time prior to the results of the vote being disclosed did representatives of the trade union express the view that the vote would not be binding. The Board also noted that the trade unions did not object to the content of CCL's press conference before the ballots were counted. 58 employees marked ballots in favour of acceptance of the final offer. 57 marked ballots for rejection of the offer. Paragraph (d) of paragraph 5 of the Board's decision contains a description of the events immediately following the vote in the following terms:

Soon after the counting of the ballots Mr. King, President of Local 368, advised CCL representatives that the union's lawyers would be preparing an intervention. He also said that the offer submitted to the employees was not really an offer because the negotiating committee had not recommended it to the membership as required by the attached memorandum of agreement. *He expressed concern about the press conference and the earlier press releases of the company.* And he may also have said that the execution of an agreement on the basis of the vote was contrary to the trade union's constitution. On Friday, October 17 at approximately 7:55 p.m. CCL officials presented Mr. King with a proposed collective agreement based on the vote for signature. He refused either to accept or to sign the document. He said that all the company had achieved "was to split the union right down the middle." He stated "that at least 57 employees were still on strike and on the picket line." He said that he had been advised by the union's lawyers that the Labour Board would not order them back to work. It was also stated that the execution of the agreement by Local 368 would be contrary to the union's constitution which required the International Vice-President's approval. Thereafter, CCL sent a telex to King indicating that it would have to take steps to bring about the completion of the agreement and that the company "[was] holding the union liable for any losses or damages incurred by [it] due to the continuation of the strike." [emphasis added]

3. Thereafter, the trade unions filed a complaint with the Board on October 21, 1980 in part objecting to the content of CCL's press conference and defended against the company's October 23, 1980 section 15 complaint on this same basis. However, at paragraph 26 of the Board's decision it found that the last minute statement of CCL was not an unlawful threat under the Act nor did it undermine the reliability of the vote. In this respect the Board ruled:

On the other hand, an employer is equally entitled to achieve proper bargaining objectives through the use of economic sanctions and the statute acknowledges an employer's freedom to express his views (see section 56). The statement that "a negative vote could, at best, see this plant closed for many months" conveys that this employer is serious

about its final offer and that it is not going to be easily moved into making further concessions. It is a public commitment to this effect and draws its credibility from the fact that three other plants have already accepted the same offer and the employer has already experienced a month long strike. We are satisfied that the average bargaining unit employee would and should understand this portion of the statement as a statement of bargaining reality. If employees were threatened by the prediction of a longer strike, it was a threat that CCL was entitled to make. In this respect, CCL's statement was a reasonable prediction based on available facts. Indeed, for the Board to prevent employers from making such statements could have the effect of depriving employees of information that conveys an accurate picture, however unfavourable to the union, of what is in store if the voters choose to reject the employer's last offer. Can we so characterize the rest of the statement as it relates to a permanent plant shutdown? Can the ending to the Bath plant statement be similarly characterized? *While the situation is very close to the line, we have come to the conclusion that neither statement should be viewed as an unlawful threat under the Act or as undermining the reliability of a vote (past or future).* This is a longstanding bargaining relationship. A strike had been in progress for a month and a negative vote could have had the effect of hardening the differences between the parties. CCL's competitors are not on strike. The industry and CCL are operating substantially below their capacities. The full text of the President's statement emphasized all of these contextual matters and the permanent plant closing was put forward as "the worst" case. At this stage of bargaining and under these conditions, the Board cannot conclude that the observation can reasonably be construed as an improper threat to close the plant regardless of market conditions. See *First Data Resources Inc.* (1978-79) CCH NLRB 29,409. Moreover, any doubt in this respect must be combined with our doubts that the statement ever reached bargaining unit employees before they voted. The offer had been accepted by three other locals of the same trade union and, on balance, we cannot conclude that the vote reflects anything other than the attractiveness of the last offer and the unattractiveness of continued strike action. [emphasis added]

4. The particulars of CCL's damage claim covering the period of October 18, 1980 to November 24, 1980, when the employees and trade unions gave up their strike and returned to work, are set out in a letter dated May 26, 1981 from CCL's counsel to counsel for the trade unions. The letter reads:

"In order to provide you with a statement of the Company's damage claim in better form and content than the hand-written summary given you at the last hearing, we wish to advise as follows:

1. *Security Expenses* (including the required minimum payment) \$697,593.73

This amount consists of the payment of the six invoices enclosed with my letter of April 21st, 1981 for services provided by Securecor at the Woodstock plant totalling \$567,813.73.

The balance consists of payments for the 1/3 of the crew transferred to Bath for the remainder of the required minimum termination period and consisting of 5 amounts at the rate of \$25,956. per week for the period November 23rd to December 28th aggregating \$129,780.

2. *Truck Rental Expense* \$ 8,210.23

1st Week — Avis — 2 Trucks	—	\$1,540.26
	—	1,538.99
2nd Week — Ryder #79670		739.74
(Invoice 33065) 48218		747.67
3rd Week — Ryder 79670		738.49
(Invoice 33155) 39727		748.51
4th Week — Ryder 79670		696.41
(Invoice 33244) 48218		744.20
	39727	715.96

Fuel 528.54

3. *Truck Damage* 3,093.19

The following trucks were damaged on the picket line on or about November 19th:

Vehicle 79670

#044677 — Towing to yard	\$ 65.00
#044678 — Rad. Repair	952.75

Vehicle 39727

#044981 — Repair Cab Wiring	24.50
#045048 — Repair Air Lines	131.79
#048774	138.75

Vehicle 48218

#044973 — Rad. Repair	1,427.22
#044982 — Window Repair	55.50
#045047 — Repair Air Lines	177.68

Enclosed please find a complete set of invoices covering claims 2 and 3 for ease of reference at the hearing."

5. Mr. Robert Brannen, Manufacturing Manager of the Ontario Region for CCL and a member of CCL's negotiating committee, testified that in mid-September officers of Securicor Investigation and Security Ltd. (hereinafter referred to as "Securicor") inquired whether CCL would be in need of their services. Discussions ensued which led to a contract being executed and it is the monies expended under this contract that make up the bulk of the claim before us. An introductory letter dated October 2, 1980 and describing Securicor's services was sent to Mr. Brannen by Mr. Paul Downing, President of Securicor. The letter reads:

"Pursuant to our recent conversation, I wish to outline concisely the methods and services provided by Securicor for your protection during a labour dispute. As you are aware, we have assisted many corporations such as yours over the years and each company during their dispute has had their own intricacies which must be dealt with on an individual basis. I have enclosed, for your perusal, a general check list of preparations which should be attended to at this time.

The areas of prime concern are as follows:

A. Gathering of Intelligence Information for Legal Use.

B. Protection of Corporate Assets and Executive Protection.

A. Gathering of Intelligence Information for Legal Use

The most important aspect of good security is intelligence. It allows us to know what will transpire before it happens. Effecting this service immediately will enable us to plan ahead and reduce any possibility of undesirable situations. Internal undercover is suggested immediately. External undercover is incorporated when hiring an internal investigator is not possible.

B. Protection of Corporate Assets and Executive Protection

In order to prevent acts of sabotage and wilful damage, susceptible areas can be guarded by uniformed personnel. Upon inspection of the material premises we can surmise where the guards and surveillance cameras will be best deployed. (As Securicor specializes in strike security, personnel are trained to avert potentially volatile situations.)

As you are well aware police have special procedures with respect to legal strikes. Police procedures are similar throughout Ontario but co-operation varies with the different forces. A rapport with the applicable force should be developed. Establishing exactly what their commitment will be with respect to security and laying of charges is strongly suggested. It should be kept in mind that it is the employers legal right to bring shipments of materials into or out of the plant during a labour dispute and that the police have a duty to uphold this basic right.

Sometimes situations arise whereby company executives are the target of threats, intimidation or physical assaults. Securicor can provide individuals in plainclothes capable of handling these types of occurrences. Our employee will also act as a personal aid or chauffeur and will follow instructions given to him by any executive he is assigned to, with of course, their safety in mind.

ALL RETAINERS — One weeks billing, applied to last weeks billing.

COST

- A — Intelligence Internal..\$15.00/man/hour, plus wages, plus expenses
 - Intelligence External.\$50.00/man/hour, plus expenses
 - General
 - Investigations \$28.00/man/hour, plus expenses
 - Photographers \$30.00/man/hour, plus expenses
 - Follow Cars \$28.00/man/hour, plus expenses
- B — Physical Uniformed
 - Security Guards ..\$12.50/man/hour
 - Security
 - Supervisors \$14.50/man/hour
 - Executive
 - Protection \$35.00/man/hour, plus expenses
 - All Transportation . \$00.30/klm.

I look forward to assisting you in the near future and at that time discussing in more detail, services which will assist you to project your company's desired image."

Attached to this letter was a specific proposal for the Woodstock and Bath plants. The Woodstock proposal took the following form:

Bob:

The following proposals are based on our summation of requirements when we visited your two above mentioned facilities. We have suggested what we at Securicor have agreed would provide you with blanket coverage. With the fact in mind, that you know your locations better than us, we are open to your suggestions regarding your protection. Further recommendations can and will be more easily made after a period of familiarity.

Objectives: Securicor will endeavor to establish and maintain a secure and safe atmosphere encompassing corporate property and both bargaining unit and non-bargaining unit personnel, by means of photography and factual reporting and documentation. Also of importance, is the safety and well being of the general public. Keeping the peace is of great concern.

Dress: Security guards will maintain low profiles (blazers and slacks). Investigators will be dressed in plain clothes.

Duties: Security guards will patrol all inside property, while investigators and photographers will be responsible for exterior patrols, picket monitoring, company traffic surveillance, photographic evidence, documentation and police liaison.

WOODSTOCK ONTARIO PLANT

Service Requirements: One photographer/investigator to oversee this location and to act as liaison officer between management and security.

Days: 7:00 a.m. — 7:00 p.m.

<i>Security Guards:</i>	To foot patrol the plant interior.	4 Guards (12 hrs ea)
	2 Teams of 2 Men	
<i>Investigators:</i>	Mobile patrol standing by some 300 feet from the picket line at the main entrance.	1 Investigator 1 Photographer (12 hrs ea)
	1 Team of 2 Men	
	Roving patrol of central exterior and eastern perimeter, including railway line, natural gas facility, and water station.	1 Investigator 1 Photographer (12 hrs ea)
	1 Team of 2 Men	
	Roving patrol of central exterior and western perimeter, including hydro facilities, crusher station, property encompassing the pit, and water pump stations.	1 Investigator 1 Photographer (12 hrs ea)
	1 Team of 2 Men	
	Shift supervisor responsible for stationary monitoring of both visual and radio communications (established in plant main office).	1 Photographer (12 hours)
	1 Man	
<i>Photographers:</i>	Will be second man in mobile patrol vehicle during the days only, investigators will be used during nights only. (The night supervisor only will be a photographer). This is to facilitate personnel backup, witness and photographic evidence in the event of a breach of the peace.	
Day Shift Total Hours:	Guards	48 Hours
	Investigators	36 Hours
	Photographers	48 Hours

Nights: 7:00 p.m. — 7:00 a.m.

<i>Security Guards:</i>	Patrols will increase to	10 Guards
	5 Teams of 2 Men	(12 hrs ea)
<i>Investigators:</i>	Patrols will remain the same.	6 Investigators
	3 Teams of 2 Men	1 Photographer
	One shift supervisor	(12 hrs ea)
<i>Photographers:</i>	Not applicable.	

Night Shift Total Hours: Guards 120 Hours
 Investigators 72 Hours
 Photographers 12 Hours

DISBURSEMENTS

Equipment required to be arranged for by Securicor

<i>Vehicles:</i>	Each roving patrol will require a four wheel drive pick up truck.	3 Trucks
	3 Patrols Per Shift	
	Shift changes will require either a van with ample seating or two station wagons.	2 Wagons
	Strike supervisor will be floating between both Bath and Woodstock plants and, therefore, will need a separate vehicle. A passenger van would be suitable.	1 Van
<i>Radio Communications:</i>	One base unit will be required to be situated within the main plant office.	1 Base
	Each team or individual will require a portable unit. Maximum requirements for proposed service.	16 Units
	Also of necessity are:	3 Power Bars 16 Chargers 16 Extra Batteries
<i>Camera Equipment:</i>	To be supplied by Securicor.	

Accommodations and
Food:

Meal allowance \$15.00/man/day.

One room for every two men (arrangements to be made by Securicor.) 16 Rooms

Maintenance of Production

Non-union personnel can be recruited. These personnel will be screened according to the situation in order that a low profile be maintained. They will be experienced in the required skills and it is suggested that management personnel be used (where possible) in supervisory capacities. Our internal supervisors can record payroll hours and perform other personnel record keeping functions.

Shipping and Receiving of Product

Product movement can be maintained by use of non-unionized truck drivers. Each driver will be accompanied by a helper who acts as a lookout and provides corroboration of any possible situation. The use of "Follow Cars" can assist truck drivers being followed, thereby insuring union sabotage is kept to a minimum, and deliveries made on time.

COST

Maintenance of Production Regular Salary Plus 40%

Shipping and Receiving of Product \$30.00/hour — \$60.00/hour

6. Brannen testified that the arrangements for security services were actually made on October 17, 1980, although the written contract for the services is dated October 20, 1980. He testified that a quotation for similar services had also been obtained from Lilly and Company but that company eventually withdrew its offer. He said the quoted charges were higher but a copy of the quotation was never produced. A key provision of the contract related to its termination. In this respect the contract read:

"... The above mentioned security will be initiated upon the receipt of the agreed upon retainer and will be removed only upon the termination of the current labour dispute or upon receipt of 60 days notice in writing by either party.

Bob, as you are aware there is a 4 week minimum billing per location should the dispute be quickly settled. Trusting this meets with your approval, I remain,"

7. Brannen testified that CCL purchased the services to protect the company's assets. It was worried about an escalation of the labour dispute if as CCL intended, operations were commenced. The property of Woodstock embraces approximately five hundred acres with the plant site occupying thirty to forty acres of this area. By letter dated October 31, 1980 Brannen gave Securicor "a 60 day notice" of termination of services under the above clause. It was his understanding that this is how the contract had to be terminated regardless of when the dispute stopped. With the conclusion of the dispute at Woodstock on November 20th and a

return to work scheduled for November 23, it was agreed between CCL and Securicor that two thirds of the staff at Woodstock would be released with two weeks notice for a charge of \$90,216. The remainder were transferred to Bath and Utilized there at a weekly charge of \$25,956.00 for the remainder of the notice period triggered by Brannen's letter of October 31. A summary of the cost of the services including the effect of the termination arrangements were set out in the following form:

SECURITY — SUMMARY

SECURICOR INVESTIGATION & SECURITY LIMITED

October 18 - 26	:	\$ 87,668.98
October 27 — November 2	:	87,635.87
November 2 — November 9	:	88,651.44
November 10 — November 16	:	100,523.95
November 17 — November 23	:	113,117.49
November 27 — Termination (14 days)	:	90,216.00

Approximately 2/3 of crew. Remainder require 1 month notice and are charged on Bath Invoices (\$25,956.00 per week).

November 30th total paid re Bath	:	25,956.00
153,755.89		
December 1 - 7th total paid re Bath	:	25,956.00
142,329.48		
December 8 - 14	:	25,956.00
December 15 - 21	:	25,956.00
December 22 - 28	:	25,956.00
		\$697,593.73

TERMINATION OF SECURICOR SERVICES @ WOODSTOCK PLANT

— 2 Photographers

2 x 12 hours x 14 days @ \$30.00 per hour = \$10,080.00

— 9 Investigators

9 x 12 hours x 14 days @ \$28.00 per hour = 42,336.00

—*18 Guards

18 x 12 hours x 14 days @ \$12.50 per hour = 37,800.00

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29 men	\$90,216.00
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**NOTE:*

12 guards terminated at Woodstock plus 6 guards terminated at Bath.

Personnel transferred to Bath

5 — Supervisors

12 — Photographers : 6 replaced guards terminated at Bath

6 were used as additional guards at Bath

3 — Investigators

The following are charged on Bath invoices

5 — Supervisors x 12 hours x 7 days x \$30.00/hr.	= \$12,600.00
3 — Investigators x 12 hours x 7 days x \$28.00/hr.	= 7,056.00
6 — Guards x 12 hours x 7 days x \$12.50/hr.	= 6,300.00
	\$25,956.00

8. At the request of the Board and by letter dated April 21, 1981 counsel to CCL provided counsel to the unions with copies of the invoicing CCL intended to rely upon to establish its claim. In a number of recent cases involving claims for substantial damages the Board has entertained pre-hearing motions requesting production of documents and greater particularity. In granting these requests, in whole or in part, the Board has relied upon section 103(2)(a) which provides:

103.-(2) Without limiting the generality of subsection (1), the Board has power,

- (a) to summon and enforce the attendance of witnesses and compel them to give oral or written evidence on oath, *and to produce such documents and things as the Board considers requisite to the full investigation and consideration of matters within its jurisdiction* in the same manner as a court of record in civil cases; [emphasis added]

Reliance has also been placed on Rule 47(3) of the Board's Rules of Practice which provides:

47.-(3) Where a statement in an application or complaint or in any document filed under these Rules in respect of the application or complaint is so indefinite or incomplete as to hamper any person in the preparation of his case, the Board may, upon the request of the person made promptly upon receipt of the application, complaint or document direct that the information stated be made specific or complete and, if the person so directed fails to comply with the direction, the Board may strike the statement from the application, complaint or document.

And, in some of these cases, a labour relations officer has been appointed by the Board to facilitate the exchange of material between the parties and to assist in settlement efforts. Clearly, if such cases are to be litigated fairly and, particularly, if there is to be any chance of

settlement, full and frank disclosure by the parties of both the detailed particulars of a damage claim and the documentary evidence that will be relied upon must occur prior to a hearing before the Board.

9. Mr. Brannen was extensively cross-examined on the contents of the invoices. It is clear that he had tried to use a few rough mathematical calculations to check the accuracy of the charges levied by Securicor but, many charges such as the \$5,040 for 840 photographs on invoice #0764, were simply accepted at face value. Mr. Brannen had not seen any of these photographs and he could not explain why so many had been taken. He did not know of any specific investigation undertaken by Securicor staff and he never saw an investigation report pertaining to the Woodstock location. He had not asked to see any vouchers or details pertaining to charges for meals, motel accommodation, cars, gas, radios and other miscellaneous charges before paying the charges as invoiced.

10. The maximum deployment of Securicor personnel included 43 people over two shifts. Brannen estimated that at the same time 40 non-bargaining unit personnel of CCL were on the site operating the plant and equipment. Some of CCL's people had been transferred from other locations for the duration of the strike. He testified that CCL's own personnel could not be involved in surveillance because they were required to work. CCL had decided assistance from the OPP detachment in Woodstock would not be adequate in the circumstances. Brannen understood that the police would not patrol the perimeter of the company's property on a regular basis nor station themselves on the picket line. However, he agreed that the police responded to occurrences on November 18 and 19; that there had been no incident requiring police prior to retaining Securicor; that ninety percent of the bargaining unit had ten years of seniority with the company or more; and that there had never been acts of violence during earlier Woodstock strikes. But Brannen stressed that until October 20, 1980 CCL had not tried to operate nor had it tried to operate in any earlier strike. Moreover, strikes at the Bath plant had apparently involved violent conduct. Brannen also testified that on or about September 22 and 23 pickets from Woodstock had impeded entry and exit of vehicles at a St. Mary's Cement location twenty-five miles away and that he expected to have a similar problem if and when CCL commenced operations.

11. Keith Downing, Director of Security Services for Securicor, supervised Securicor personnel at the Woodstock site. He testified at some length about how transformers could be "knocked out" or "blown up" and buildings and equipment destroyed. However, on cross-examination he exhibited very little knowledge of the precise nature of CCL's operations, plant and equipment. He also did not seem to know very much about the demography of this particular workforce. He testified that the number of people used by Securicor was designed to deter violent acts; that photographers took pictures to be used if charges were laid; that escort vehicles were used to discourage damage to trucks; and that a large number of guards was needed to patrol the perimeter of the property and deter picket line violence. However, he advised that, as a rule, his personnel would not physically stop an offence. He pointed out that during his presence at the strike, picketers had removed air hoses; tires had been slashed; a truck window broken; radiators had been punctured; and a car had been severely rocked. He agreed that there had not been any vandalism to property or the presence on CCL property of unauthorized persons. Securicor personnel were paid anywhere from \$5.00 to \$12.00 depending on their assignment. A guard was paid the least and a photographer the most. It does not appear that the personnel receive extensive training. Because two shifts were employed, personnel worked up to eighty-four hours a week and overtime rates were at time

and one-half. Downing testified. Downing did not present any vouchers or other documentation for the invoiced charged to CCL.

12. Andrew Robb, the Plant Manager at Woodstock, testified that CCL decided to operate on October 21, 1980 after the majority of the bargaining unit had voted in favour of the employer's last offer. At least eighty percent of the bargaining unit came to the work site on that date, but no one crossed the picket lines. In any event, the plant was started up and CCL began to ship. CCL felt the strike was over and that work opportunities should be provided to those wanting to work. It appears to be Robb's evidence that he spoke to the OPP police in Woodstock twice; once before the company had decided to ship and once after. The first time related to a fear that Bath pickets might come to Woodstock; however, his testimony was principally directed at a contact on Monday, October 20, 1980. He said he learned at this time that the police would respond to any complaint about a problem, but they were very concerned not to appear to be taking sides. He understood there was not a large OPP staff at Woodstock and, for this reason, it could not provide continuous surveillance. Until the company began to operate only non-bargaining unit personnel were engaged in surveillance including some staff from the Bath and Toronto offices. These people had apparently expressed concerns about what might happen in crossing the picket line if the company began to operate and this appears to have played a role in the decision to retain security services. Robb had no indication that problems would arise, but he wanted to be prepared. Laidlaw Transport hauls cement for CCL from Woodstock to its customers and Robb testified that Laidlaw's employees are unionized and had advised their employer they did not wish to cross the picket lines at the CCL Woodstock site. Accordingly, CCL decided to rent an adequate number of tractor trailer units to haul the product to the Laidlaw equipment. Invoices from Ryder Truck Rental Ltd. and Avis Canada Inc. were submitted to support the claim of \$8,210.23 together with a \$528.24 fuel charge. Until the last day or two of the strike, CCL did not experience any substantial problems in moving through the picket lines. However, during the last two days damage to the leased vehicles was sustained in the amount of \$3,093.19 for which invoices were submitted to CCL by Ryder Truck Rental and paid. Although no damage was sustained to the trucks during the first part of the strike, picketers did stand in front of the trucks; trucks were followed into Woodstock; and placards were placed across windshields in an effort to obstruct the driver's view. CCL shipped every day from October 21 to November 21, 1980 with six loads on the first day and up to sixteen to seventeen loads on the last day. After the damage was done on November 19, Robb said the police stationed a constable within view of the plant gate. He also agreed that the police come out to investigate incidents any time they were called, but prior to November 19, 1980 there had been "hardly any aggressive acts." On November 19, 1980, one day after the release of the Board's decision, the picketers were "most agitated and angry" and it is on this day that a truck window was broken; radiators were punctured; and a car was rocked. He said he took a copy of the Board's decision to the union's trailer on November 19th, but trade union officials said they would get their own. On November 20th, CCL continued shipping but it was agreed with the union that the pickets would be removed if Securicor personnel were removed. This agreement was carried out; a collective agreement was signed on November 21; and the employees returned to work on November 21.

13. Carl Hutter, Manager of Distribution and Market Planning, testified that he caused CCL to pay Ryder Truck Rental for damage it claimed had been sustained by its Truck going through CCL's picket lines. Hutter did not see the damage sustained but was aware of the various incidents. He did not know if the persons charged with the damage had been

ordered by a court to pay for the losses caused. He did not know if CCL was suing the people who caused the damage claimed for or whether CCL even knew who had caused the damage. There also was no evidence that any employees had been disciplined or dismissed for their conduct on the picket line.

14. John Grignon and Robert Overfield are employees of Securicor and testified about damage to vehicles sustained on November 19, 1980. Grignon identified several photographs capturing picketers breaking a truck window and a headlight; removing air hoses; and rocking a vehicle. Individuals engaged in these acts were identified as CCL employees and a Mr. Brunsdon, Secretary-Treasurer of the Local union, was the individual identified as having a screw driver in his hand for the purpose of damaging radiators. A number of photographs identify Brunsdon as a participant in the picket line misconduct and clearly indicate he was doing nothing to discourage the improper conduct. The Board was advised that he has been charged with certain offences in connection with his conduct on the picket line. Brunsdon was not called as a witness by the unions to explain or defend his conduct on the picket line. Neither employee of Securicor knew whether the police had been called although they indicated the police were at the picket line "two or three times" that particular day. Grignon testified that for most of the day ten fellow employees sat in a van "as reserves". They apparently assisted through the picket line the car that was being rocked.

15. Lorne King, President of the Local 368, described a thirty-three day strike in 1961 and a nine week strike in 1975 as peaceful. The 1980 strike began September 19 and King described it as uneventful. He said a local union official told bargaining unit employees to conduct themselves in a peaceful manner and to stay off the company's property. On cross-examination, King admitted that the union had not taken any action against members who had breached these instructions. King said there were six to a dozen strikers picketing at the main gate on a twenty-four hour basis and two or three strikers at the main gate. King said he would not sign the collective agreement presented to him by Robb on October 17 after the positive last offer vote. He said he had received an opinion indicating it was unclear that he was obligated to abide by the vote. He said he did not feel the union had a collective agreement based on the vote and the union subsequently filed a complaint on or about October 21, 1980 (Board File No. 1535-80-U). On cross-examination, he said he was not in favour of the employees returning to work until the Labour Board ruled on the issue and that he understood, at the time, there was a risk that the Board would rule against the union and award damages. He said the union was prepared to run that risk. He said the International Vice-President could not sign the collective agreement and King also refused — a decision he described as being that of the local trade union.

16. King testified that he learned of the Labour Board's decision from his own lawyers on November 20, 1980. The Board, however, takes notice that copies of the decision were provided to counsel for all parties on the afternoon of November 18, 1980. Copies were also made available to the media shortly thereafter on the same day. King said "a lot of animosity" had arisen because of the presence of Securicor and he thought this could be best dissipated by "a cooling off period" whereby both the pickets and Securicor were removed.

17. Staff Sergeant Douglas K. Ross is the Detachment Commander for the OPP unit in Woodstock. He testified that the unit consists of thirty-three officers. He said that he heard about the strike through the local news and then alerted his staff to it. He said the first time he was approached from anyone from CCL was by Mr. Robb on October 20, 1980. He advised

that the company would be shipping the next day and that CCL had Securicor coming in. He did not ask for additional police to be present. On cross-examination he admitted he could not deny that Robb may have had a conversation with someone at the station on or about September 5, 1980 but he would expect to have been advised of such a discussion by his subordinates and was not.

18. The OPP unit is responsible for Oxford County which consists of some nine hundred square miles. He admitted that it would be hard for his unit to surveil the company's property. However, he said that his officers quickly responded to the twenty-one occurrences reported during the strike and said that nothing happened the OPP could not handle. He said that in difficult circumstances reinforcements can always be requested. He said seven criminal code charges, two careless driving charges and one dangerous driving charge arose out of the strike.

Submissions

19. On behalf of CCL it was submitted that the company had reasonably limited its claim to expenses directly arising from the continuation of the strike in violation of section 15. Being direct expenses, the claim did not raise an issue of "remoteness". Counsel emphasized the testimony of Brannen, Downing and Robb that the expenses related to reasonable steps taken by CCL to protect its property and carry on business as it was entitled to. Counsel contended that service from the OPP was inadequate because it had to be based on a complaint basis. CCL wanted to prevent the need for any complaint. It was submitted that the trade unions took no steps to avoid or minimize picket line confrontation and, indeed, one senior official of Local 368 engaged in such misconduct. Counsel further contended that there was little or no evidence that King refused to sign the collective agreement tendered to him on October 17, 1980 out of concern for the last minute press conference conducted by CCL's President. Counsel agreed that both King and Burshaw acted to support negotiations elsewhere in the county. It was also submitted that the union's could have removed the pickets until this Board ruled on the matters before it. Counsel urged the Board to find that a collective agreement should have been executed by October 18, 1980 and that CCL was entitled to compensation for all monetary losses sustained after this date as claimed. The Board was referred to *Grey-Owen Sound Health Unit*, [1980] OLRB Rep. Feb. 223; *Radio Shack*, [1979] OLRB Rep. Dec. 1220; *Academy of Medicine*, [1977] OLRB Rep. Dec. 783; *Westinghouse Canada Ltd.*, [1980] OLRB Rep. April 577; *De Vilbis (Canada) Limited*, [1976] OLRB Rep. Mar. 49; *Mayne and McGregor on Damages* 12th ed. 1961, p. 38, pp. 131-132 and pp. 145-156; and Brown and Beatty, *Canadian Labour Arbitration* (1977), pp. 60-61, p. 515. Referring to paragraph 33 of the Board's earlier decision in this matter, counsel submitted that all of the cases referred to had been cases of first impression on the particular facts therein and yet the Board did not refrain from awarding damages. Finally, counsel asked that liability be allocated equally between the two trade unions having regard to the facts as established.

20. On behalf of the trade union it was submitted that damages, apart from wage claims, amounted to extraordinary relief and, on the cases, had only been awarded when supported by the following principles: (1) Damages have been awarded only where the order promotes collective bargaining. In this particular case the strike was lawful; the effect of section 40 was uncertain; the last minute statement of CCL clouded the responsibility of the trade unions; and the unions had not been guilty of any earlier unfair labour practices. The Board was referred to *Radio Shack, supra*; *Academy of Medicine, supra*; *The Journal*

Publishing Company of Ottawa Limited, [1977] OLRB Rep. June 309; *Grey-Owen Sound Health Unit*, *supra*; *Fotomat Canada Limited*, [1980] OLRB Rep. Oct. 1397; *K-Mart Canada Ltd.*, [1981] OLRB Rep. Feb. 185. Counsel emphasized that the Board must keep in mind its statement in *Radio Shack* that the reasons for a statutory violation have to be taken into account and that remedies were primarily instruments of regulation and education. It was counsel's submissions that these purposes clearly had been served. (2) Remedies must be tailored to individual cases after all the circumstances have been considered. In this respect, counsel stressed that the strike was lawful and that the positive section 40 vote did not affect its legality. The Board's attention was directed to the Board's decision, *The Journal Publishing Company of Ottawa Limited*, *supra*; where it was held that losses cannot be recovered when they arise from a lawful strike. (3) Damages must be compensatory and reasonably foreseeable. Relying on *Grey-Owen Sound Health Unit*, *supra*, counsel submitted it was not reasonable to obtain any kind of security service. The bargaining relationship was a mature one. Ninety percent of the bargaining unit consisted of high seniority employees. Violence broke out in the picket line on only one day at the conclusion of the strike immediately on release to the Board's decision. The police had no difficulty maintaining order. It was counsel's submission that, if anything, CCL's actions reflected a "commando mentality" that exacerbated the situation. Alternatively, counsel contended that the level of security service was far beyond the limits of reasonableness in the circumstances. No investigation reports were submitted; no one knew why so many photographs were necessary; the police had not been relied upon; and very little professional knowledge was known to Securicor about CCL's plant and workforce. In short, "CCL had used an army to deal with gold watch employees." It was also submitted that CCL did not reasonably review and check Securicor charges. Counsel pointed out that CCL had made no real effort to rely upon the OPP and there was nothing unusual about the strike at the Woodstock location. Counsel also argued that the losses sustained by damage to the trucks was not caused by the trade union and that they had not been properly established in any event. Counsel stressed that the union did not sanction this kind of misconduct and CCL or the rental company should go against the individuals responsible. It was also pointed out that, on the face of the contract between Securicor and CCL, CCL was not entitled to recoup anything after November 20, 1980 when the strike ended and that, in any event, CCL got full value for the services transferred to its Bath plant. (4) Damages should not be awarded if they arise from legal economic sanctions, counsel submitted. He contended that the picketing was clearly lawful and that the Board, in *Canteen of Canada*, [1978] OLRB Rep. Mar. 207, has stated it has jurisdiction only with respect to picketing arising out of an unlawful strike.

Decision

21. We first wish to deal with the issue of whether compensation is ever an appropriate remedy by which to enforce a party's obligation under section 40. In its previous decision in this matter, the Board held that the failure to execute a collective agreement reflecting the results of a last offer vote conducted under section 40 "*may* constitute a violation of section 14 [section 15] which can be remedied by the Board on the filing of a complaint under section 79 [section 89] of the Act" (emphasis added). Earlier in the opinion the Board was again tentative in stating "that the wording of the section makes it abundantly clear that a vote in favour of accepting a last offer creates, *in the usual case*, the basis upon which a binding agreement between the employer and trade union is to be entered into" (emphasis added). The Board explained its qualification of the obligation arising out of a section 40 vote in the following terms:

... However, we emphasize the qualification "in the usual case" because there may be circumstances where a trade union would be justified in refusing to submit to the results of a vote. For example, if a vote has been influenced by improper or illegal conduct of an employer, it would be patently silly to conclude that the trade union is violating section 14 [section 15] by continuing to negotiate and refusing to submit to an outcome that does not represent the true wishes of the employees in the affected bargaining unit. Or a last offer may appeal to the majority of bargaining unit employees and, yet, be in blatant violation of the trade union's duty under section 60 [section 68] because of the invidious treatment of a minority of employees.

A similar but much more difficult situation may arise where the outcome of the vote has been clearly influenced by the segregated ballots cast by a large number of strike replacement employees. If the vast majority of the employees in the bargaining unit who were employed at the commencement of the strike have, however, voted to reject the last offer and to continue their strike, it would be counter-intuitive, in an industrial relations sense, to conclude that the trade union is automatically bound by the wishes of employees it does not really represent. Indeed, the employer's offer in such circumstances might even contain terms which are very damaging to the trade union as an entity, i.e. See *Wilson Automotive (Belleville) Ltd.*, [1980] OLRB Rep. July 1136 where an employer's offer contained a demand that the trade union compensate it for losses sustained during a strike. Whether the trade union is obligated to submit to the balloting in these kinds of situations may well depend on the duration of the strike at the time of the vote and other important industrial relations facts. Quite different approaches may also be needed where the employer and trade union have agreed at the outset of negotiations to multi-plant negotiations or other format conditions of bargaining. All of the above, therefore, are useful examples by which to illustrate that a collective agreement need not automatically follow an affirmative vote in a bargaining unit to accept an offer and that section 14 [section 15] must be applied in light of accepted principles of collective bargaining. As will be elaborated below, the section is intended to end industrial conflict and cannot be used as a vehicle to achieve some destructive aim wholly inconsistent with the overriding purposes of the statute.

22. Further, at paragraph 6 the Board observed:

... Pre-vote conduct or communications involving coercion, intimidation, threats, or undue influence can undermine the reliability of a directed vote and cannot be tolerated or have been intended. To require the trade union to execute a collective agreement where an employer has engaged in such conduct would simply contribute to the illegality and reward the wrongdoer.

23. Indeed, this latter point was the very issue before the Board and required it to set out

a standard for assessing the propriety of pre-vote communications. In this respect, the Board wrote:

A vote pursuant to section 34e [section 40] is, in effect, an extension of the bargaining process or, at least, a product of an impasse that has arisen out of negotiations. Therefore, it makes sense to provide for the *Noranda Metals Industries* type of latitude as section 34e [section 40] vote is approached. In both instances, the parties have an equal opportunity for reply and possess the common object of entering into a collective agreement. The “laboratory conditions” approach which tends to be the standard applied in representation votes has been geared to a very different labour relations context where the parties are often dramatically opposed and unrepresented employees may be easily influenced. However, section 34e [section 40] does involve a vote and provides an employer with a legitimate opportunity for direct access to employees. This vote will be rendered meaningless and the opportunity abused if an employer is permitted to unlawfully coerce or intimidate employees into accepting last offers and abandoning their right to concerted activity. In this case we are confronted with an alleged threat to plant closure at a time when the parties were at an impasse and the employees had been on strike for almost one month. Several issues, therefore, present themselves in light of the above analysis and in light of the facts before us. First of all, did the employees receive the employer’s message? This is a factual issue and arises in this case because the impugned statement was made at a press conference immediately prior to the last offer vote. Newspapers in different cities at different times reported different interpretations of the press conference. Secondly, if they in fact received information emanating from the press conference, was its content such that the average employees would have reasonably construed it as a threat by the President of CCL to close the plant regardless of economic conditions? If there was the clear implication in the statement that the employer would take action solely on its own initiative for reasons unrelated to economic necessities, the statement would not be a reasonable prediction based on available facts but a threat of retaliation based on misrepresentation and coercion. Where an employer’s conduct breaches this standard, the reliability of the vote will be in doubt and he will be taken to have forfeited the limited opportunity provided under the section. Moreover, this loss of opportunity should provide a strong disincentive to improper communications independent of the complaint processes of the Act.

24. Applying these principles together with section 61 of the Act, the Board acknowledged that the disputed statement was “close to the line”, but found it was not improper; the unions were therefore required to submit to the results of the vote; and the unions had failed to bargain in good faith and make every reasonable effort to enter into a collective agreement by refusing to execute the collective agreement presented by CCL on October 17, 1980. It is against this background we must now determine whether or not damages are an appropriate remedy as requested by CCL. The Board has a discretion not to award compensation under section 89, but it is a discretion which should be exercised judicially and only in accord with compelling labour relations considerations. The trade unions have urged the Board to refuse

compensatory relief to CCL because (a) the legal effect of section 40 was unknown at the time they acted; (b) they believed in good faith that their constitution prevailed; and (c) they believed the last minute statement of CCL's President to be improper.

25. Clearly arguments (a) and (b) are of no force. Neither are proper defenses. All new provisions of a statute must have a first case and parties must comply with such laws. Laws, of course, must be written as clearly as possible but much must often be left unsaid. General language is employed because every factual situation cannot be taken into account. Parties regulated by such statutes must assume the risk that their conduct may violate the provisions in question and, when in doubt, caution is recommended. Effective administration of these laws would be severely impeded if a complaint could be successfully defended by the argument that the violation was unclear. This position is unaffected by the International's reliance on its constitution. Unless provided for, parties cannot contract out of a statute and the risk of being wrong in this regard must reside with the respondents for the same reasons as it does in the "first case" situation. However, argument (c), the alleged effect of the last minute statement of CCL's President, is more difficult to deal with.

26. Clearly, if employers are to be subject to compensatory orders for breach of the bargaining duty so should trade unions. But not all violations, be they by employers or trade unions, are properly remedied by monetary compensation. For example, failures to rationally discuss items as in *CIL*, [1976] OLRB Rep. May 199 or to provide vital information as in *De Vilbis*, *supra*, are best remedied by a simple direction. Even if there exists the possibility of some monetary loss occasioned by the resulting delay, this Board should, in the normal course of events, be reluctant to evaluate the loss in monetary terms. Serious consideration of such claims may deflect the Board and the parties from the central purpose of the complaint and add unwarranted time in the processing of such matters. The difficult questions of causation associated with such potential loss particularly raise this spectre and with nowhere near the same justification for a compensatory approach as exists in the blatantly bad faith situation such as in *Radio Shack* and *Fotomat*, *supra*. Judicial approaches in respect of damage assessments draw their purpose from the substantive law of torts and contracts and therefore should not be imported wholesale into labour relations. This Board must be sensitive to the purpose of its own statute and the particular provisions being construed in fashioning remedies. More will be said about this later.

27. What has to be remembered in this case is that it centers on a vote and involves an issue which commonly arises out of a balloting process, i.e. whether or not certain communications unfairly or unlawfully affected the results of that vote. Section 40 provides no specific indication of how such controversies are to be resolved. Indeed, section 40 provides no explicit guidance as to how the unequivocal results of such balloting are to be enforced. This latter silence was the focus of the Board's earlier decision wherein it declined to hold that a section 40 vote had no binding effect or that the statute contained no enforcement mechanism. In order to make sense of and give practical effect to the new provision, the Board decided sections 15 and 89 were convenient vehicles for the enforcement of section 40 and consistent with legislative intent. This decision was recently upheld by the Supreme Court of Ontario in a unanimous decision. This initial decision having been made, would it be equally sensible and practical to assess damages against a party who has, in good faith and on reasonable grounds, unsuccessfully contested the results of a section 40 vote on one of the foreseeable bases set out in the Board's earlier decision? We think not. When considering the silence of section 40 on the question of enforcement, we thought it inconceivable that the Legislature wished the interven-

tion of balloting without intending that a vote in favour of accepting the employer's last offer be binding. We think it equally inconceivable that the Legislature would have intended substantial compensatory awards to be issued in response to disputes over the usual kind of issues that can arise from balloting procedures. For example, the final results of balloting could hang on the Board's disposition of an employer's objection to the entitlement of certain persons to vote. In the context of strikes, allegations that employees working elsewhere during the strike have severed their employment are not unusual. See *Brooker Trade Bindery Ltd.*, [1973] OLRB Rep. Dec. 612. If the employer was successful before the Board and the Board therefore concluded that the trade union was obligated to submit to the results of the vote, would the added remedy of substantial compensation capture the Legislature's intention in enacting section 40? To ask the question is to answer it in our view. The purpose of section 40 is to end a collective bargaining impasse where this is in accord with the wishes of the majority of the bargaining unit. Where a party in good faith and on reasonable grounds challenges the result of a vote as an accurate representation of the majority's wishes, we do not see how the purpose of section 40 would be served by causing compensation to run before those challenges have been dealt with and the majority's wishes authoritatively identified. Indeed, awarding compensation in the face of proper objections would more likely inflame relations between the parties and create unwarranted and distracting employee anxiety over last offer balloting. Employees should know that such balloting will be carried out fairly and correctly before any issue of compensatory relief for non-compliance arises and this employee state of mind is also in the interest of employers who elect to make use of the section.

28. We point out that the two sections, sections 15 and 40, are functionally inter-related and the precise effect of section 40 may have to await the Board's intervention where challenges arise out of the balloting. This is to be contrasted with the typical section 15 situation where the respondent trade union or employer must only contend with its obligations under section 15 and harmonize its bargaining objectives and tactics with the requirements of that sole provision. The position of a trade union objecting in good faith and reasonably to the validity of a section 40 vote is more closely like that of an employer who contests the validity of a representation vote conducted under section 7 of the statute. Fortunately, in representation matters there is no immediate obligation to recognize the trade union following the vote. Instead, the Board first entertains the employer's objections and then, if dismissed, a certificate issues which then triggers the bargaining duty. However, we see no reason why a similar approach cannot be fashioned in respect of good faith and reasonable objections to section 40 votes by exercising our discretion under section 89 not to award compensation until after the Board's decision dealing with the objections. We also see no reason why the Board could not expedite such hearings in order to facilitate industrial peace and minimize any potential economic loss. Last offer vote balloting may raise very significant challenges to voting entitlement; the conduct of the parties; or pertain to the very degree of voter support necessary to trigger a binding result. In discussing these possible complexities, the Board stated in its earlier decision "that section 14 (now section 15) must be applied in light of accepted principles of collective bargaining". We know of no other section of the Act that is so closely intertwined with section 15 while at the same time potentially requiring the Board's intervention to dispose of very proper objections that may arise out of the actual administration of the section. Clearly, the situation in this case is distinguishable from those found in *Grey-Owen Sound Health Unit*, *De Vilbis* and *Fotomat*, and relied on by *CCL*, *supra*. We also point out that the employees were engaged in a lawful strike with all the "emotional baggage" that conflict of this kind entails. It seems to this Board unrealistic to require a trade union, having raised a proper objection to the vote's result, to end an otherwise lawful strike for the

period of time required to process the objection before the Board. It is our view that the Legislature intended this intervention into collective bargaining to be accomplished with as little disruption as possible and this is the spirit of the Board's approach herein. It is, therefore, the Board's view that while a refusal to accept the results of a section 40 vote immediately triggers the bargaining duty, refusals made in good faith and on reasonable grounds will not be met by the automatic imposition of monetary orders under section 89 running from the date of the vote if and when the underlying objections are dismissed. Following the dismissal and the Board's decision, the full remedial force of section 89 will respond to continued refusals. We wish to stress that objections must have a reasonable basis to them to activate the Board's discretion. Only by so requiring can we balance the competing interests of employers and trade unions in these matters.

29. The Board must therefore ask itself whether the refusal of the trade unions to sign a collective agreement on October 17, 1980 was based, in whole or in part, on their objection to the last minute statement of CCL's President and, if so, whether that objection was reasonable and made in good faith.

30. In its earlier decision, the Board noted that neither party objected to the conduct of the vote and the trade union did not take exception to the company's earlier conduct before the vote was counted although, at paragraph 3, we noted that "soon after the counting of the ballots . . . [Mr. King] expressed concern about the earlier press releases of the company". We would also point out that objections to CCL's last minute statement formed a central part of the complaint filed by the trade unions on or about October 21, 1980. In the circumstances, we are prepared to accept that one of the reasons for the trade unions' refusal to be bound by the results of the vote related to the last minute statement of CCL's President. We do not think it realistic to require all objections to be made before the actual balloting or counting of the ballots. Objections must be made in a timely fashion, but there are any number of acceptable reasons why an objection might not be raised until after the balloting has been completed. In the facts at hand, the disputed statement of CCL was not made until a few hours before the employees cast their votes. It would obviously take some time to evaluate the seriousness of such a statement and what the trade unions' position ought to be. The timing of the trade unions' objection in the facts before us does not undercut the assertion that this was one of the reasons why they refused to sign the collective agreement. Accordingly, there will be no compensation awarded CCL for the period up to November 18, 1980, the date of release of the Board's decision to the parties. However, CCL claims compensation for expenses sustained after this date. Damage to the rented vehicles occurred after this date and some portion of the payment relating to truck rental and security services also relates to a period of time after November 18, 1980. We therefore turn to CCL's entitlement to compensation for losses sustained after the issuance of the initial decision in this matter.

31. CCL's claim brings into issue the appropriate principles to be applied by this board in assessing claims for economic loss. A handful of recent cases have indicated the Board's willingness to award compensation outside the context of a backpay order where warranted but few of these cases have required an analysis of the appropriate labour law approach to damage assessment. The parties before the Board in this case joined issue on a number of matters in this area and, thus, a general review of the evolving principles is appropriate.

32. Earlier in this opinion we said that compensation awarded under section 89 and the other remedial provisions should draw its purpose from the *Labour Relations Act* and the

particular substantive provisions in issue. Principles of damage assessment developed in contract and tort law may provide useful analogies but, in the final analysis, labour law principles must prevail. Legal concepts such as “reasonable foreseeability”, “causation” or “remoteness” all tend to reflect the aims of either contract law or tort law. When studied carefully, they amount to formulae by which loss and risk are allocated in light of what contract and tort law are trying to accomplish. In essence, they amount to policy determinations in particular cases. Professor Swinton, in her very learned article, has observed:

Fuller and Perdue, in their classic article “The Reliance Interest in Contract Damages”, noted that it is just as important to decide where to stop in the enforcement of promises as it is to decide where to begin in that process. Should the defaulting promisor be required to compensate the promisee for all the losses caused by his failure to perform (leaving aside for the moment any debate over the flexibility of the concept of causation)? Or should he be protected to some degree from liability which could be a crushing burden out of all proportion to the benefit which he expected to receive under the contract? Should the taxi driver who promises to deliver the business tycoon to his plane on time be liable for the loss of a lucrative deal because he gets tied up in a traffic jam? Should a manufacturer supplying substandard cloth to a company making shirts be liable for the loss of future orders from customers dissatisfied with the product?

Courts have had to make difficult decisions in assessing where to stop in the enforcement of contracts. They may purport to adhere to the general principle that the innocent party should be placed in the position in which he would have been had the contract been performed, yet invariably they invoke doctrines which place some limit on the defaulting party’s liability: certainty, causation, mitigation, or foreseeability. The focus of this study is the last of these four doctrines, that of foreseeability.

And dealing specifically with the doctrine of foreseeability, she writes:

Even if the foreseeability rule is a justifiable one, its application in the courts has not always been satisfactory. This flows largely from the judicial failure to acknowledge that the “rule” is really little more than a statement of general principle. The decision to find certain types of losses foreseeable and not others is the result of a conscious policy decision to protect certain interests. Such decisions require elaboration and exploration, yet too frequently the application of the foreseeability rule is treated as an exercise in fact determination, and any efforts to elaborate reasons have focussed on an exegesis of the words in *Hadley v. Baxendale*. Judges and commentators have made valiant attempts to articulate the precise degree of foreseeability required in order that damages for breach of contract be compensable, yet the products of their efforts are frustrating in their abstraction. Canadian courts on the whole have tended to adopt the developments and elaborations in the English courts. Thus, resort has been made to the range of cases from *Victoria Laundry* to *H. Parsons (Livestock) Ltd. v. Uttley Ingham Ltd.*, which have

struggled with the meaning of damages expected “reasonably” to arise naturally or damages “reasonably” within the contemplation of the parties expected to arise as the “probable” result of the breach. Does this mean that a reasonable man must foresee that a loss was “likely to result,” “liable to result,” a “serious possibility,” a “real danger” or “on the cards”? Do any of these tests really help in allocating loss? Lord Asquith’s efforts to explain *Hadley v. Baxendale* in the *Victoria Laundry* case caused some consternation in the House of Lords in the *Heron II* case, particularly with regard to the phrase “on the cards.” As a result, the various Law Lords tried to elaborate their versions of foreseeability, with Lord Reid strenuously trying to avoid imposition of liability in contract law as wide as that in tort law and each of the judgements making an effort to describe the proper degree of foreseeability. Similarly, in the *H. Parsons (Livestock)* case, Lord Scarman tried to describe what would be a “serious possibility” at the time of contracting.

The striking characteristic of all of these judicial efforts to deal with the foreseeability test is their lack of practical assistance in determining whether any particular loss was or was not foreseeable “on the facts of this case.” One has only to refer to the extensive discussion of the rule of foreseeability in damages in Lord Reid’s judgement in the *Heron II* case followed by an extremely brief and conclusory application to the facts of the case for a striking example. A strictly legal or mechanistic analysis of the rule is inadequate to aid in the determination of the proper scope of liability in a given case. Judges are not undertaking a factual determination on the basis of the rule (or rules) described above. They are making important determinations as to who should bear a loss which has resulted from the breach of a contract. In doing so, they may be adapting the concept of foreseeability at times to meet changing circumstances.

See Katherin Swinton, *Foreseeability: Where Should The Award of Contract Damages Cease?*, found in Reiter and Swan, *Studies in Contract Law* (1980).

Tort law’s grappling over the years with economic loss is a classic illustration of how loss allocation principles are, in effect, policy determinations grounded in the purposes of a particular field of law. See Linden, *Canadian Tort Law* (1977), p. 367. Labour law can be no different. Indeed, damage cases have already begun to emphasize distinctive labour relations policy considerations.

33. In *Grey-Owen Sound Health Unit, supra*, the employer violated section 14 [section 15] by not complying with its contractual promise to the trade union to resort only to interest arbitration at contract renewal time. Economic loss sought to be recovered by the union and said to have arisen out of the statutory breach included compensation in respect of wages for employees who had been wrongly locked out and compensation to the union for having to engage counsel to make two applications to the Board and in respect of funds expended “in order to focus attention on the employer’s conduct, mobilize public support for the trade union and make it clear that the trade union was not responsible for the work stoppage”. With respect to the latter expense, the union tendered bills in respect of rental payments for a “lock-

out headquarters", radio and newspaper advertising, long distance telephone calls, and certain printed material. While awarding compensation to the employees, the Board disallowed all compensation to the union. It did so on labour relations policy grounds even though the expenses were reasonable in quantum and could be said to have been "caused" by the statutory violation. The legal expenses were disallowed in accord with the *Radio Shack* holding refusing to award legal fees as compensation under section 89 to trade unions who win their cases because the Board lacks the power to award such compensation to employers when they win their cases by having trade union complaints dismissed. This inequality in result could impair the integrity of Board orders. Thus, while principles of causation, remoteness or reasonable foreseeability would support recovery, labour relations policy considerations have dictated otherwise. With respect to monies expended by the union to maintain "a favourable public image", the Board held that they did not "arise so necessarily and directly from the employer's breach that in order to effectuate the policies of the Act" it was necessary to grant compensation. The Board went on to say such expenses were simply "too remote" and that other effective remedies (compensation to the employees and the Board's direction under section 15) had been given. While not expressly identified, a number of labour law principles pertinent to damage assessment arise from these conclusions. In simple labour relations terms, the Board did not see the expenses so directly arising from the statutory violation as to merit compensation and despite the fact that contract and tort mitigation principles could easily have justified recovery. Indeed, the following passage of Lord Macmillan in *Banco de Portugal v. Waterlow*, [1932] A.C. 452, 506 relied upon by CCL nicely captures the kind of reasoning that would have sanctioned recovery:

"Where the sufferer from a breach of contract finds himself in consequence of that breach placed in a position of embarrassment the measures which he may be driven to adopt in order to extricate himself ought not to be weighed in nine scales at the instance of the party whose breach of contract has occasioned the difficulty. It is often easy after an emergency has passed to criticise the steps which have been taken to meet it, but such criticism does not come well from those who have themselves created the emergency. The law is satisfied if the party placed in a difficult situation by reason of the breach of a duty owed to him has acted reasonably in the adoption of remedial measures and he will not be held disentitled to recover the cost of such measures merely because the party in breach can suggest that other measures less burdensome to him might have been taken."

34. However, this Board regulates ongoing collective bargaining relationships and must keep in mind the requirements of industrial peace. "Deep pocketed" mitigation rules have the potential for prolonging such conflict and related adversary attitudes and ignore the speedy "injunctive like" relief available from labour boards. A labour board should be concerned more with the core purpose of a complaint and the remedies necessary to achieve that purpose. The employer in *Grey-Owen Sound Health Unit, supra*, had been directed to cease and desist in the lock-out and the employees had been compensated. It could not be said that the effectuation of important statutory rights depended on the union being compensated for its legal costs and public relations expenses. The requested relief was therefore characterized as too remote and denied.

35. *The Journal Publishing Company of Ottawa Limited, supra*, and its relationship

with *Radio Shack, supra*, and *Fotomat, supra*, is equally instructive. The *Journal* was another bargaining case where the union had brought the complaint in response to a prolonged lock-out. The union sought compensation for the employees and itself. While the Board found "instances of bad faith bargaining", it refused to let minor or somewhat technical breaches of the statute trigger a landslide of monetary compensation. More specifically, the Board found that the breaches did not demonstrate a "plot to destroy the unions", but did reveal "a bitter and protracted dispute that [could] only be resolved by sensible and realistic attitudes on both sides of the bargaining table". The Board also refused to award damages to the employees and the union because (a) it would be required "to determine terms and conditions of employment" for a period in which no contract existed; (b) it would compensate for damages resulting from the legal use of economic sanctions; and (c) "neither side [could] be given a clean bill of health, both sides on different occasions having failed to meet the standard of good faith bargaining". *Radio Shack* and *Fotomat* clearly qualify reason (a). In *Radio Shack*, the Board directly examined the implications of granting compensation in bargaining cases. Having regard to its past experience, it concluded that previous refusals in this respect had taken "the freedom of contract" rationale too far. The Board is now of the view that the absence of power to impose a collective agreement leaves unaffected the Board's power to direct the execution of a collective agreement embodying terms that have been agreed upon, see *Municipality of Casimir, Jennings and Appleby*, [1978] OLRB Rep. June 507; to direct the removal of items from a bargaining position that constitute a breach of section 15 or to resubmit an offer which was withdrawn in contravention of the statute, see *Fotomat Canada Ltd.*, [1981] OLRB Rep. Feb. 145; and to award compensation to employees who have likely experienced monetary loss due to flagrant breaches of the statute, see *Radio Shack, supra*. But this latter power to award compensation to employees for breach of the bargaining duty must be analyzed carefully and approached with caution. So must requests for compensation by trade unions and employers. The requirements of labour law policy must be kept clearly in mind.

36. *Radio Shack* reviewed a number of ways in which employee bargaining losses might be assessed. One focussed on the difference between (i) what employees received during the period of breach, and (ii) what they received multiplied by the percentage change in wages and other benefits reported, for example, in the monthly publication, *Collective Bargaining Settlements and Negotiations in Ontario* Ministry of Labour and Labour Canada for the month in which the delay began. Other equally authoritative sources of data might be resorted to. Another approach emphasized contracts between the complainant union and the particular employer or other employers and possibly in the same or a relevant geographic area. Where the parties have entered into a collective agreement after the violation, the level of wages in that contract is also available to evaluate the level of previous loss. This latter approach may still leave the employer with some windfall gain to the extent the wage levels in the agreement reflect the impact of unlawful delay. But damage assessment cannot be an exact calculus and the delay and complexity associated with a more precise determination may outweigh the benefits of a more accurate approach.

37. We do, however, wish to point out that the Board has not turned its back on the concern expressed at paragraph 61 of the *Journal* case that "[t]he mere existence of an element of bad faith bargaining cannot convert an otherwise legal strike or lockout into an illegal act, that would give rise to extensive liability in damages." The Board went on in that case to say:

The wrong lies with the manner in which negotiations are conducted, not with the use of the economic sanction. To hold otherwise would

introduce into the strike and lock-out an element of uncertainty that would disrupt the process of labour relations as it now exists in Ontario. In this case, although it is clear that the lock-out was not connected initially with any failure to bargain in good faith on the part of the employer, it would be argued that the employer's later failure to bargain in good faith subsequently tainted the lock-out. We do not accept this argument. The lock-out continued to be legal and damages, if any, must relate to extra negotiating costs that might have been caused by the employer's conduct and not to the economic losses resulting from the lock-out itself.

When the strike or lock-out constitutes the very act of bad faith or breach of section 15 complained of, as it did in *Grey-Owen Sound Health Unit, supra*, the concern expressed above has no application. However, where employees go on strike in the face of bad faith bargaining, for example, or after going on strike the employer violates the duty, the *Radio Shack* approach to employee loss comes in direct confrontation with the *Journal's* policy concern of "introducing an element of uncertainty that would disrupt labour relations. . . ." Clearly, the Board decided against accepting this concern in its entirety because compensation was awarded in *Radio Shack*. But in fashioning such economic relief, underlying policy considerations of the *Journal* decision must be kept in mind. Not every technical breach should be remedied by monetary compensation; a point made above in relation to the *De Vilbis* and *CIL* cases. Such breaches cannot realistically be identified as the primary cause of any economic loss. Equally important, employees are unlikely to be compensated for the wages they would have received had they not been on strike. While they should be awarded the difference between what they would have received had they continued to work and those wages multiplied by the percentage increase that would have resulted from good faith bargaining as outlined above, the award of complete wage loss arising during a strike runs the risk of prolonging economic conflict and encouraging unfounded bad faith bargaining complaints. It also ignores the fact that the employees voluntarily remained away from work while acknowledging the employer was bargaining in bad faith. In this sense, they have contributed to their own loss. In other words, the Board is attracted to the concept of awarding only the percentage increase that would have flowed from good faith bargaining from the point in time the bad faith bargaining commenced, taking into account a reasonable period of time that would have been required to negotiate a good faith wage increase. With respect to trade union claims for economic losses, we point to the refusal of the Board in *Fotomat* to award the trade union any compensation. That decision demonstrates the Board's willingness to look realistically at the respective bargaining power of the parties and any errors in bargaining judgment in assessing this type of claim. Unions that run headlong into first contract strikes while alleging bad faith bargaining should not take for granted that this Board will overlook what would naturally have resulted from economic confrontation had there been no bad faith bargaining.

38. Finally, at this level of general principle, the Board has some reservations that sections 89, 93 or 135 can make a proper contribution to industrial peace by the Board awarding economic compensation against individual employees jointly and severally for concerted activity clearly lacking union involvement. The United States Supreme Court in *Complete Auto Transit v. Reis* (1981), 107 LRRM 2145 recently came to a somewhat similar conclusion after an exhaustive review of legislative history. It is not the custom in Canada to place great reliance on the kind of material that permeates the *Reis* majority judgement but

there is much in that judgment relevant to the Canadian context. At a more pragmatic level it can be argued that the *Labour Relations Act* and its practice and procedure is designed to provide expeditious relief in the form of a cease and desist direction in the case of individual employees engaged in "wildcat" actions. It is doubtful that substantial compensation orders against individual employees would contribute to industrial peace if the spontaneity of group action in a workplace setting has a psychological measure of inevitability to it. Moreover, other remedies available to employers under collective agreements, the Criminal Code and at common law constitute important supplementary devices. This perspective, of course, should not deter the Board from considering compensatory relief against the trade union where job action is so widespread as to impute trade union involvement. It might also be added that the Board's "reservations" might be overcome if other remedies prove to be inadequate.

39. In the case before us, the employer seeks \$3,093.19 for damage sustained to certain rented trucks after the release of the Board's decision; a portion, approximately \$2,000.00, of the truck rental payments also relates to the period after the release of the decision. Security service costs directly related to the period November 19, 1980 to November 23, 1980 total \$64,977.00. Beginning first with claims for the damage inflicted on the rented trucks, we are satisfied, on the evidence before us, that the trucks were damaged by bargaining unit employees represented by the trade union. In the ordinary case such facts would not justify an order against the trade union. Where property damage is inflicted by individuals acting on their own initiative and without the trade union's approval no claim can be made against the trade union. Although it could be argued that had there been no picket line there would have been no damage, it is our view that the intervening act of the individual is the direct cause of the damage not the trade union in the example given. The loss as it relates to trade union conduct is too remote. Moreover, in such circumstances other remedies are available to the employer by civil action; under the collective agreement; and criminal charges can be preferred. However, in the facts before us, damage was inflicted on the vehicles only after the release of the Board's decision; counsel to the trade unions had notice of the Board's decision on November 18, 1980; and a key local trade union official was identified as having participated in the picket line misconduct. Brunsdon was not called as a witness to explain his actions on November 19, 1980. We are not prepared to accept King's evidence that he first learned of the decision on November 20, 1980. Rather, having regard to his reaction to Andrew Robb's offer of information on the afternoon of November 19 and to the reaction of the picket line on that day, we are prepared to infer knowledge as early as the evening of November 18 or the morning of November 19. Therefore, on the facts before us, we are prepared to find that the trade union sanctioned and condoned the misconduct on November 19, 1980. In coming to this conclusion, we have had particular regard to the timing of the misconduct; the actions of Mr. Brunsdon; and the inactivity of other trade union officials. It is therefore our finding that the two trade unions are jointly and severally liable for the documented damage to the rented trucks subject to any monies received from individual employees as a result of other legal proceedings. We wish to make clear, in awarding this loss, that the decision turns very much on the unions' obligations flowing from section 40 and section 15. It is not at all clear that section 15 by itself can be violated by such misconduct.

40. Turning to the rental expense for the trucks, we do not accept the argument that because the picket line was in connection with a lawful strike economic loss caused by it is not properly compensable. We do not believe *Canteen of Canada Ltd.*, *supra*, goes that far. The continuation of the picket lines after the release of the Board's decision was the act of the two trade unions and directly inconsistent with their obligations under section 15 and section 40. It

is also reasonable to conclude that they intended to frustrate the removal of product from the plant by having other unionized employees honour the picket line. In labour relations terms, we find that the renting of the trucks was a reasonable act of CCL to mitigate the consequences of the picket line and that the portion of the rental expenses incurred after November 18, 1980 should be shouldered by the two trade unions jointly and severally, and we so direct. We set the amount at \$2,000.00.

41. This brings us to the security service expenses. Securicor personnel testified in some detail about the kind of violence that can arise out of industrial conflict. Sadly, industrial sabotage has been experienced by employers in some labour disputes. While such violence is exceptional and isolated, employers are clearly entitled to take steps to guard against and prevent the possibility of such losses. However, if a trade union is not to be made economically accountable for the actual losses inflicted by individuals where it has not sanctioned or encouraged such actions, it cannot be made accountable for the costs shouldered by an employer in seeking to prevent such individual acts. There is no evidence before us that the trade unions were planning to sabotage CCL's plant and equipment or that CCL had reasonable cause to believe that trade unions might engage in such improper conduct. We, therefore, are not satisfied that the level of expenditure for security services in this case can reasonably be said to have been caused by the trade unions' violation of the Act after November 18, 1980. While we have found that certain improper acts committed on the picket line are traceable to the trade unions, the level of security service provided by Securicor was not reasonably related to those acts involving, as they did, approximately \$3,000.00. We also do not accept that CCL should simply have assumed the assistance from the Ontario Provincial Police would be totally inadequate to deal with picket problems. The evidence indicates that the O.P.P. came when called and that on or about November 19, 1980 one police officer was stationed in the vicinity of the picket line. However, we agree that CCL might reasonably have hired additional employees to drive its trucks through the picket line after November 18, 1980 and to help it cope with and defend against the obstructive conduct by persons on that picket line. There are ample labour relations reasons why an employer might want to resort to outside security services in circumstances similar to those that existed on November 19, 1980. By continuing the picket line and by at least one of their officials engaging in picket line misconduct, it can reasonably be said that the trade union caused the expenditure for additional security services. In the circumstances, we have decided to set \$8,000.00 as the additional operating expense reasonably incurred after November 18, 1980 in this regard or at about one third the level of daily charges actually shouldered by CCL on November 19th and 20th, accepting that the delay after that was reasonably related to the return to work.

42. We, therefore, direct the trade unions, jointly and severally, to compensate the complainant CCL in the total amount of \$13,093.19. All other claims for compensation are dismissed.

DECISION OF BOARD MEMBER, B. L. ARMSTRONG;

1. I concur with the Chairman's decision except for that item of damages awarded against the respondent trade union with respect to the damage caused to the rented trucks.

2. The decision at paragraph 39 states that in the ordinary case the union would not be held responsible for damage caused by individuals acting in their own initiative and without the trade union's approval. However, the decision then goes on to find that in the present case the union sanctioned and condoned the misconduct.

3. To reach this conclusion, the decision seems to rely solely on the fact that a union official was identified as one of the persons who participated in the picket line misconduct. Apart from this evidence, the Board heard no testimony linking the trade union to the violence. There was no evidence that it encouraged, approved or condoned the violence at the picket line. The atmosphere at a picket line is unavoidably one of tension. A trade union can only attempt to keep things under control. If individuals, whether union officials or union members, go on a frolic of their own, the remedy should be against the individuals rather than against the union.

4. In the present case, the only evidence the Board heard was that Mr. Brunsdon participated in the misconduct. The Board has no basis to find the union culpable in any way. I would have dismissed the claim against the union as it related to the damage caused to the trucks.

DECISION OF BOARD MEMBER, J. D. BELL;

1. I agree with the Chairman's decision with one exception, the amount awarded for security costs. The company should be made whole for the costs of security incurred for the period of time after the Board's decision was issued, i.e. November 19 to November 23, 1980. The amount is \$64,977.00, instead of the \$8,000.00 awarded in paragraph 41 of the decision.

2. I would therefore direct the trade unions to compensate CCL for a total amount of \$70,016.19.

1367-81-M United Brotherhood of Carpenters and Joiners of America, Local 38, Applicant, v. Carwood Store Fixtures Limited, Respondent.

Construction Industry Grievance – Whether employer contravened agreement by failure to pay in lieu of notice of lay-off within time limits specified – Whether mailing of wages within time limits sufficient

BEFORE: R. A. Furness, Furness, Vice-Chairman, and Board Members H. J. F. Ade and C. A. Ballentine.

***APPEARANCES:** David McKee and B. Wunovic for the applicant; Ron Mark and Norbert Englisch for the respondent; Bruce Binning and Jim Thomson for the employer bargaining agency.*

DECISION OF R. A. FURNESS, VICE-CHAIRMAN AND BOARD MEMBER H. J. F. ADE; December 23, 1981

1. The applicant has referred a grievance concerning the interpretation, application, administration or alleged violation of a collective agreement to the Board for final and binding determination.

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3. The applicant has alleged that the respondent has violated Articles 6.05 and 6.07 of the provincial collective agreement between The Carpenters' Employer Bargaining Agency and The Ontario Provincial Council, United Brotherhood of Carpenters and Joiners of America (O.P.C.) effective from July 7, 1980, to April 30, 1982, (the "collective agreement"). It is agreed that the collective agreement is binding on the parties to this grievance. Articles 6.05 and 6.07 state:

6.05 When an employee is laid off from a job on a scheduled regular layoff he shall receive one hour's notice with pay and he will be permitted to leave the job immediately after the one hour's notice is given. If the employer fails to give the employer one hour's notice in advance of layoff, the employee shall be paid an additional one hour's pay at straight time rates. At the time of layoff the employee shall be paid in full and given possession of all his documents. If the employee cannot be paid and be given his documents at that time, he shall receive his pay and documents within 48 hours. The 48 hour period is exclusive of Saturdays, Sundays and Statutory Holidays. If this provision is not complied with, the provisions of 6.07 hereof shall apply.

6.07 If an employee fails to receive wages and documents in accordance with the provisions of Article 6.05 or 6.06, he shall after notice be paid waiting time at straight time rates not to exceed eight (8) hours in any day for each regular working day until the employee is in possession of such wages and documents. It is understood and agreed that all fringe benefits will be paid as per the agreement.

4. This grievance has been filed on behalf of Peter Hanshar and Patrick O'Shea. The applicant is seeking wages and fringe benefits for waiting time. The respondent denied that it had violated Articles 6.05 and 6.07 of the collective agreement and adopted the position that cheques and termination documents were prepared and mailed on Wednesday, September 9, 1981.

5. The evidence established that Mr. Hanshar and Mr. O'Shea were laid off from a job in Niagara Falls by the respondent on Friday, September 4, 1981. The following Monday was Labour Day. On September 9, 1981, Patricia Blakely, a secretary employed by the applicant in Niagara Falls, telephoned the respondent in Kitchener. Mrs. Blakely made this telephone call (the first telephone call) in connection with an inquiry about the "papers" for another employee named Clem Tonnies. Subsequently, Mrs. Blakely made another telephone call to the respondent (the second telephone call) on September 15, 1981, in response to an inquiry from Mr. Hanshar who had not received his pay cheque. On the first occasion Mrs. Blakely asked to speak to someone in the payroll department and spoke to a person who was identified at the hearing as Donna Horseley, the respondent's bookkeeper and payroll clerk. On the second occasion, Mrs. Blakely asked to speak to the same person in the payroll department. She was informed that the person she had spoken to previously was not at work. At this point, Mrs. Blakely asked to speak to someone else and was referred to a man who was working in the respondent's office.

6. The contents of these two telephone calls is in dispute with the evidence of Mrs. Blakely and Mrs. Horseley differing in certain key areas. There is no doubt, however, that Mr.

Hanshar received his cheque at his home on Friday, September 18, 1981, and that Mr. O'Shea received his cheque at his home on Thursday, September 17, 1981.

7. It is clear that the grievors did not receive their pay within the time limits set forth in Article 6.05. One question to be determined is whether notice was given as required by Article 6.07 in order for the penalty provisions therein to be brought in to play. Another question to be considered is the conduct of the parties both generally and specifically in connection with the circumstances which give rise to these grievances.

8. In considering the evidence of Mrs. Blakely and Mrs. Horseley, the Board believes that both of them gave their evidence to the best of their ability. The difference in their testimonies, in our view, arises from the accuracy of their memories. In giving her evidence, Mrs. Blakely qualified some of her answers with "I think" and "I don't recall" and in cross-examination she was not sure of the time of day of the first telephone call and conceded that Mrs. Horseley may have said that the cheques were prepared and ready to go out in the mail. On the other hand, Mrs. Horseley's evidence was not qualified in this way. In our view, Mrs. Horseley had better recollection of the relevant events which occurred in September of 1981 and the Board accepts the evidence of Mrs. Horseley in preference to the evidence of Mrs. Blakely where their evidence is not in agreement.

9. Mrs. Horseley testified that she is in charge of the respondent's payroll office and that the respondent is engaged in performing work in Ontario and throughout Canada. The respondent and its payroll office are located in Kitchener, Ontario. During 1981 the respondent has laid off between thirty and forty employees under the terms of the collective agreement. It has been the practice of the respondent to mail wages and documents to persons who have been laid off in Ontario. Up to the time of the filing of these grievances, the respondent had not received any objections to this practice. While previously there had not been any problems in Ontario; the respondent has, where problems have been encountered, made bank transfers to employees who have been laid off. In using the services of the Post Office to forward wages and documents to employees who have been laid off, the respondent has not previously received any complaints from the applicant.

10. When Mrs. Horseley arrived at work on the morning of September 8, 1981, there were five time sheets on her desk. The time sheets of Mr. Hanshar and Mr. O'Shea were included in the five time sheets. The calculations for wages and deductions were made on September 8, 1981, with respect to the persons whose names appeared on the time sheets. It is the job of Angela Proksch to type the cheques. Miss Proksch received the information for the cheques at the end of the working day at five minutes to five on September 8, 1981. Miss Proksch typed these cheques during the morning of September 9, 1981. These cheques were signed during that morning by Norbert Englisch, the owner of the respondent. Once the cheques were signed by Mr. Englisch, Mrs. Horseley before mid-day placed the cheques together with the appropriate documents in envelopes. At this point it is the responsibility of Miss Proksch to affix sufficient postage and mail the letters.

11. Mrs. Horseley gave evidence that she spoke to Mrs. Blakely on the telephone between 4:00 and 4:30 p.m. on September 9, 1981. According to Mrs. Horseley, Mrs. Blakely said she was calling from the St. Catharine's union and was inquiring where was the money for the carpenters. Mrs. Horseley responded that she had put the money in the respondent's mail for two of the carpenters, was unaware that three others were finished, and had made up

cheques for these three carpenters. There was still some confusion over the actual state of affairs because when Mrs. Horseley said these three cheques would be sent to the job site, Mrs. Blakely advised her that these three carpenters were no longer working at the job site. Mrs. Horseley's understanding was that the cheques and documents were to be out of the respondent's office on September 9, 1981. She explained to the Board that when she informed Mrs. Blakely that the cheques were in the respondent's mail she meant that the cheques were in the mail tray and not that they had been deposited with the Post Office. With respect to the other three carpenters, Mrs. Horseley informed Mrs. Blakely that she would have to telephone the foreman or the supervisor at the job site to see if they had been terminated. Mrs. Horseley gave evidence that she told Mrs. Blakely that she would work overtime in order to make these inquiries. A telephone call was made which confirmed the terminations. At this point, Mrs. Horseley contacted Mr. Englisch and the cheques were prepared by 4:45 p.m. Subsequently, these cheques and accompanying documents were mailed by the respondent. No grievance has been filed with respect to these three carpenters.

12. Angela Proksch is employed by the respondent as a receptionist/clerk. She testified that on September 8, 1981, she was working in the respondent's office and explained that she receives cheques, types and bonds them and gives them to Mr. Englisch for signature. Miss Proksch gave evidence that she prepared the cheques for Mr. Hanshar and Mr. O'Shea on September 9, 1981, and that the cheques had been given to her to prepare at about 4:50 p.m. on September 8, 1981. She informed the Board that Mr. Englisch signed the cheques on September 9, 1981, and that she gave the completed cheques to Mrs. Horseley on the same date. Miss Proksch testified that it is her practice to collect the mail on her desk from the mail tray, put it through the postage machine and deposit the mail in a mailbox on her way home between 5:00 p.m. and 6:00 p.m. She informed the Board that she placed the letters for Mr. Hanshar and Mr. O'Shea in a mailbox on her way home from work on September 9, 1981. The two envelopes which contained the cheques and documents and which were addressed to Mr. Hanshar and Mr. O'Shea were filed in evidence and bear a metered cancellation dated September 9, 1981. These two envelopes also bear an additional cancellation (presumably by the Post Office) dated September 15, 1981.

13. Mrs. Blakely was not sure whether she referred to the period of forty-eight hours in Article 5.05 and she agreed in cross-examination that when she said that the wages and documents had to be "out" she meant "out to the men or sent out" and that she did not indicate that placing the cheques and documents in the mail was unsatisfactory. The Board finds that there was no unequivocal notice given to the respondent on September 9, 1981. Indeed, even if notice had been given by Mrs. Blakely on behalf of either the applicant or the respondent's former employees it could only have related to Clem Tonnies (who is not a grievor). If notice had clearly been given to Mrs. Horseley on behalf of the respondent, the wages and documents for all five carpenters could have been delivered personally. Similarly, the second telephone call, even assuming that it was meant to be notice under Article 6.07, only related to Mr. Hanshar. By this time the wages and documents for Mr. Hanshar (and Mr. O'Shea) had already been mailed on September 9, 1981 and the respondent was not expected to provide duplicate material for Mr. Hanshar. The Board finds that Mrs. Blakely, in acting as an agent for the applicant, by the necessary implication of her words, gave the respondent an assurance that the mailing of wages and documents was satisfactory. The Board further finds that the respondent relied on the assurances and a promissory estoppel arose even if the second telephone call constituted notice on behalf of Mr. Hanshar under Article 6.07. See *Combe v. Combe* [1951] 1 All E.R. 767, 770.

14. In these circumstances, the Board finds that the respondent has not violated Articles 6.05 and 6.07 of the collective agreement. This application is dismissed.

DECISION OF BOARD MEMBER C. A. BALLENTINE;

1. I dissent from the majority decision in this case. It is my view that the evidence of the respondent company is, for the most part, irrelevant, and there is no ambiguity in regard to Articles 6.05 and 6.07 of the collective agreement.

2. It is clear the object of Article 6.05 is that when employees are laid off they will not be kept waiting for documents and wages. Article 6.05 reads, in part, "At time of layoff the employee *shall* be paid in full and given *possession* of all his documents." (emphasis added). However, Article 6.05 allows that if the company cannot comply with the foregoing they will be given 48 hours (2 working days) to have the wages and documents in the employee's possession.

3. Article 6.07 is a penalty provision against the company for failing to comply with Article 6.05 and the 48 hour provision. Article 6.07 reads, in part, "If an employee fails to receive wages and documents in accordance with the provisions of Article 6.05 or 6.06, he shall after notice be paid waiting time at straight time rates not to exceed eight (8) hours in any day for each regular working day until the employee is in *possession* of *such wages and documents*." (emphasis added)

4. The issue of whether or when notice was given is a technicality. The fact is clear that the company was quite aware that the grievors were not in possession of their wages starting on September 4, 1981, and it was the company's obligation to have such wages in the possession of the employees within 48 hours (2 working day) after layoff. Mr. Hanshar, one of the grievors, gave evidence that he advised the project foreman about the provisions of the collective agreement on September 4th, the day of layoff. He stated that he told the foreman that his pay was to be in his hands by Wednesday, September 9th, and he also stated that the foreman said it would be there. The fact is Mr. Hanshar did not receive his pay until September 18th, some full fourteen days and nine working days after he was expected to receive it upon layoff.

5. It is my position that the respondent company violated Articles 6.05 and 6.07 of the collective agreement and, therefore, should have paid a penalty as prescribed in the agreement. The majority should not have dismissed this application.

1535-81-U Retail, Commercial & Industrial Union, Local 206
Chartered by United Food & Commercial Workers International Union,
Complainant, v. **Comstock Funeral Home Ltd.**, Respondent.

Evidence – Practice and Procedure – Unfair Labour Practice – Original charges settled by parties – Whether in subsequent complaint union may lead evidence on matters settled – Whether employer conduct tainted by anti-union animus

BEFORE: M. G. Mitchnick, Vice-Chairman, and Board Members E. J. Brady and D. B. Archer.

APPEARANCES: *Alick Ryder, Reva Devins and Charles McCormick for the complainant; Stephen McCormack, Andra Pollak and James Hotston for the respondent.*

DECISION OF THE BOARD; December 23, 1981

1. This is a complaint under section 89 of the *Labour Relations Act*, alleging a series of unfair labour practices subsequent to the certification of the complainant.

2. The complainant's application for certification was filed May 1, 1981, and the hearing of that application took place on Friday, May 22nd. The application ultimately was limited to the "full-time" employees of the respondent, made up at the time of the following:

Wayne Smith	—	Funeral Director
Randy Wilson	—	Funeral Director
Victor Surerus	—	Funeral Director
Richard Davy	—	Articling Student
Barry Simmons	—	Driver, Maintenance Man
Cathy Simmonds	—	Secretary to the Home

The complainant's membership count was disclosed as either 4 out of 5, or 5 out of 6, depending upon the inclusion or exclusion of Ms. Simmonds, whose status was in dispute. There was also filed an employee statement in opposition, in support of which Mr. Smith, one of the funeral directors, appeared at the hearing. In assessing the materiality of the statement in opposition, the Board announced that none of the employees who signed the statement had also signed cards in the complainant. Assuming, therefore, that Mr. Smith had signed the statement in opposition in support of which he had attended at the hearing, it was not a difficult feat of logic for the respondent to arrive at the conclusion that the only one of its full-time employees who had not signed a union card was Mr. Smith.

3. On May 25th, the first day back at work, the respondent announced that Mr. Smith was being promoted to "supervisor" (which included a raise in pay). Mr. Smith had considerable managerial background, and was told at the time of his hiring in January of 1981 that advancement to management would be considered. Mr. Smith was in effect appointed to replace Mr. Wilson, who had asked to be relieved of the position of supervisor in February or March of 1981. At that time, the respondent states, Mr. Smith was spoken to about possibly picking up some of Mr. Wilson's responsibilities. His salary, however, was not altered at that point, and no mention was made to any staff members that Mr. Smith had acquired any additional authority. The respondent, while suggesting that it had been its intention to exclude

Mr. Smith all along, was unable to explain why Mr. Smith had been included on the respondent's list of employees in the bargaining unit as of the date of the application for certification.

4. Also on May 25th there arose two issues with respect to employee breaks at the Home. The Home at that time was under the ownership of Mr. Maxwell Comstock, with Mr. Donald Marr serving as Senior Manager, and Mr. James Hotston the Junior Manager. Mr. Hotston attended the certification hearing in Toronto on May 22nd and reported the results to the other management members on the weekend. On Monday, Mr. Marr noticed several of the employees of the Home sitting down to have a coffee first thing in the morning. This, Mr. Marr acknowledged, was accepted practice in the Home, so long as there was no work to be done at the time that was "necessary", in the sense of being immediately required. Mr. Marr himself had sat down to have coffee with the employees on such occasions. On this occasion, however, Mr. Marr stated: "From now on, this practice will have to stop. In the future, if there's work to be done, you'll have to do that first". Mr. Marr was unable to recall for the Board what it was that was "necessary" or urgent on that morning, so as to prompt his comment.

5. Later that day, Mr. Hotston discovered Victor Surerus eating lunch at the front desk while waiting for the family of a deceased to arrive. He ordered Mr. Surerus to stop, and stated that henceforth there would be a "new rule" against eating lunch during working hours. Mr. Hotston acknowledged in his evidence that the Home, prior to that, had always been flexible with regard to when employees ate their lunch, since the demands of the business might, on other occasions, require employees to interrupt their scheduled lunch break for the sake of the Home. He stated that the Home may have been "lax" in the past, but agreed that what Mr. Surerus was doing on May 25th was part of a practice which had not been terminated by the respondent prior to that date.

6. The next day, May 26th, Mr. Davy, the articling student, was let go.

7. On May 28th, Barry Simmons, the driver/maintenance man, received a written reprimand threatening him with discharge if his attitude and appearance did not improve by June 1st. Mr. Simmons had been spoken to on a number of occasions in the past, but the respondent acknowledges that this is the first time at the Home that an employee had ever received a reprimand in writing. The respondent also acknowledged that the threat of dismissal was an "escalation" in its response, notwithstanding that Mr. Simmons' conduct had been at essentially the same level since the beginning of 1981.

8. A further complaint filed in this matter had to do with the installation of time clocks at the Home on June 8th. Mr. Hotston testified that the use of time clocks had been under consideration for a couple of years, and that their purpose was to record information required by the Coroner's office as to time spent on pick-ups. The use of time clocks is specifically mentioned in some of the collective agreements for this industry, and indeed subsequently came to be included in the complainant's proposals for the present negotiations. The employees, however, were unaware of the purpose of the time clocks when they were introduced on June 8th, and Mr. Hotston acknowledges they would have thought their purpose was to have employees punch in and out for their shift. Notwithstanding that the employees' concerns were communicated to the respondent by Mr. Wilson, the respondent made no attempt to explain to the employees what the purpose of the time clocks was to be.

9. On June 8th Mr. Wilson was given a warning on broad grounds pertaining to his work as a funeral director, and was terminated on June 9th.

10. Victor Surerus, the third of the original funeral directors, was involved in disciplinary action on August 31, 1981, and apparently placed on indefinite suspension.

11. The section 89 proceedings began in Toronto on September 3, 1981, and all of the above incidents formed the subject matter of complaints before the Board when the proceedings resumed in Peterborough on October 5th for three more days of hearings. During the course of the first day, however, the parties were able to reach a settlement on all of the matters in dispute, as a result of which all of the complaints before the Board were withdrawn. The terms of the settlement are, of course, of no concern to the Board. From this development, however, it must have appeared to the complainant that the respondent had finally accepted the relationship, and was prepared to get on with the amicable negotiation of a collective agreement.

12. But it was not to be. On October 8th the respondent, without in any way altering the complainant, served Barry Simmons, the driver, with a notice of layoff, and advised Cathy Simmonds, the secretary, that she effectively had a choice of accepting a new position of confidential secretary *outside* the bargaining unit, or being terminated. As indicated, not a word was said to the complainant in the settlement discussions three days before in regard to these pending new developments.

13. At the hearing of the fresh section 89 complaint which these developments predictably spawned, the complainant claimed the right to adduce evidence of all of the allegations contained in its prior complaints, on the sole basis that they were relevant in demonstrating through a pattern of conduct the anti-union *animus* necessary to sustain the present complaint. The complainant conceded that it was precluded by the settlement from seeking any form of relief with respect to the prior complaints, and made it clear that it was not attempting to do so.

14. The position of the respondent was that labour-relations policy dictated that when parties resolve complaints pending before the Board, they are entitled to know that the subject matter of those complaints will not subsequently have to be "re-litigated". For the Board to rule otherwise, the respondent argued, would be to create a disincentive to the settlement process itself. The respondent added that parties may have any number of reasons for settling in a given case, and that the Board ought not therefore to draw any negative inferences from the fact that a settlement was made.

15. The Board appreciates that any number of reasons may prompt a party to settle rather than litigate an issue, and for that reason has never sought to draw any inference whatever from either the fact of a settlement or the terms of the settlement themselves. Indeed, in the absence of a claim of non-compliance, it is doubtful whether the latter could be properly before the Board at all. On the other hand, the settlement of a particular complaint does not obliterate the fact that certain events, whether or not forming a part of such other complaint, did happen. And if those events are arguably relevant to either support or defend a fresh complaint arising from subsequent developments, the events themselves continue to be provable and admissible in evidence.

16. The Board's approach to this situation can be seen in the case of *Craftline Industries*

Limited, [1977] OLRB Rep. April 246. There it was the respondent employer who was asking the Board to draw an inference from the fact that several previous complaints against it had been either settled or withdrawn. The Board commented on that submission and as well on the extent to which evidence common to both the prior and current complaints was admissible, at paragraph 5:

The Board is not prepared to find that the complainant has engaged in an abuse of process by virtue of having filed a series of section 79 complaints against the respondent which have either been settled or withdrawn. The practice and procedures of the Board are designed to encourage settlement as an alternative to litigation. The parties are free to settle on whatever basis is mutually acceptable to them and in the circumstances of this case the Board is not prepared to infer that the previous complaints have been frivolous ones solely designed to force concessions at the bargaining table. The Board would point out, however, that the evidence adduced in respect to the prior complaints will be admitted for the limited purpose of establishing a pattern of unlawful activity and not for the purpose of gaining redress for the alleged unlawful activity.

The settlement of a complaint continues to be advantageous to a party for all of the reasons one would normally contemplate settlement. But a party is not entitled to think that by the settlement of a particular complaint, it thereby obliterates the past, and can act thereafter with relative impunity. Rather, having avoided the time, expense and risks of litigation by the settling of a complaint, a party must recognize the possibility that future conduct of a controversial kind can force it to litigate its entire pattern of conduct to that point. This is especially so when its subsequent conduct is as predictably inflammatory as in the present case, and occurs within days of the preceding settlement. For the foregoing reasons, the Board ruled orally at the hearing that it would admit evidence of facts pertaining to the prior complaints on the basis set out in *Craftline*. The parties then agreed to have the Board simply adopt its transcript of evidence from the prior proceedings.

17. With respect to the layoff of Barry Simmons, Mr. Hotston arrived at the Home on October 8th, and observed Mr. Simmons raking leaves in a strong wind. Mr. Simmons explained that he had no other work to do that day. The evidence of the respondent is that business had been down substantially for the past four to six weeks. Mr. Hotston testified that with the reinstatement of Victor Surerus, there simply was not enough work for the existing complement of staff. The letter to Mr. Simmons makes much of this point, and is less than subtle as to where it places the blame for the layoff. The letter reads:

Dear Barry:

As you are aware, Comstock Funeral Home Ltd. recently absolved a number of disputes which had been outstanding between the union and the company, and as a result of this settlement, Comstock Funeral Home Ltd., has reinstated Victor Surerus to his former position.

Unfortunately, Comstock Funeral Home Ltd. is now over-staffed and I must regretfully inform you that you are laid off, effective 4.30 p.m. Oct. 8, 1981.

I am hoping that business will pick up and we will be able to recall you in the very near future.

18. The respondent has in fact hired three new employees since the complainant's certification. One employee was hired as a funeral director in July following the discharge of Randy Wilson, and another as a funeral director in September following the suspension of Victor Sererus. In both instances the respondent was faced with unfair labour practice complaints at the time of the hirings. In addition, a third employee was hired in July, originally, on a part-time basis, but now on a full-time basis since August. This employee will be registering next fall in the Funeral Services Education Program at Humber College en route to becoming a licensed funeral director. Mr. Hotston testified that Simmons was the one to go because he is the only one limited in his qualifications to driving the limousine and performing general maintenance jobs around the Home. He added that those jobs are presently being shared by whoever is available in the Home, as has always been the case.

19. The matter of Cathy Simmons' exclusion is somewhat different, in that even though equally ill-timed with the layoff of Barry Simmons, the respondent's concerns were at least raised with the complainant at a point well in advance of the upheaval in the Home. The respondent at the time of certification took the position that Ms. Simmons had to be excluded as a confidential secretary to the Home's officers, but was persuaded to accept for the time being an agreement which included her in the unit. Shortly after the certification, counsel wrote a letter to the complainant which dealt at length with the respondent's concerns and intentions over Ms. Simmons. The letter reads in its material respects:

At this time, we also wish to clarify the issue of Miss Cathy Simmons in order that there be no misunderstanding about her status in the months ahead. You are aware that the full time bargaining unit (including Miss Simmons) constitutes six persons. You are also aware that our client sought the exclusion of Miss Simmons due to her position of "secretary to the Home" — your Union took exception to this exclusion and accordingly Mr. J. Bowman of the Board was appointed to review Miss Simmons' duties and responsibilities. When the parties met with Mr. Bowman on June 22nd, we explained our client's position to him in some detail. This explanation included:

- (i) A review of her current duties and responsibilities.
- (ii) A review of her anticipated duties and responsibilities — an explanation of why we were not prepared, as of May 22nd, to argue that Miss Simmons should be excluded, bearing in mind jurisprudence re Section 1(3)(B) of the Act.
- (iii) An explanation that with the advent of a certified bargaining agent, Miss Simmons' duties and responsibilities, as the *only* secretary to the Home, would be amended to include a continuing active role in personnel and labour relations matters. In due course she will be advised in this regard and at such point in time an application for her exclusion from the bargaining unit will be made pursuant to Section 95(2) of the Act.
- (iv) A review of her "sensitive" duties relating directly to confidential matters of the Home.

We understood that our position was made clear to your counsel, Mr. Wohl, and that he appreciated why no issue was made on May 22nd relating to Miss Simmonds and why the issue would be pursued pursuant to Section 95(2). It is unfortunate that this matter could not be decided on May 22nd and that it will necessitate a hearing before the Board in order to be conclusively resolved.

There is no evidence before the Board as to “why no issue was made on May 22nd”, and the respondent did not, as it suggested in the letter, pursue the avenue of a section 95(2) application to determine the propriety of exclusion.

20. The initiatives of the respondent producing this final complaint must be viewed in the light of the entire history of matters between the parties. Counsel for the respondent characterizes the various complaints brought against it as largely trivial in nature. What the Board sees, however, is an unfortunate example of an essentially mature and flexible employer adopting a petty and vindictive stance towards its employees as a result of their opting for collective bargaining. It is the response of the employer, in other words which has produced the “trivial” nature of some of these complaints. Having regard to the timing and sequence of the various events, as well as the provisions of section 89(5) of the *Labour Relations Act*, the Board is satisfied that the respondent has engaged in a persistent pattern of anti-union conduct in response to its employees’ decision to become organized. The Board recognizes that it is dealing with a small employer in a largely unorganized service industry, and does not expect the employer to welcome the advent of a bargaining agent. The employer is required, however, to maintain its response within the permissible limits of the *Labour Relations Act*.

21. With respect to the layoff of Barry Simmons, the Board is not persuaded that the timing of the layoff and the selection of Mr. Simmons were not affected, at least in part, by anti-union *animus*. That, as the Board has noted in a host of cases, is sufficient to render the respondent’s conduct unlawful. See, for example, *Barrie Examiner*, [1975] OLRB Rep. Oct. 745, at paragraph 17; *R. v. Bushnell* (1974), 1 O.R. (2d) 442; *Pop Shoppe Toronto Limited*, [1976] OLRB Rep. June 294. Given the respondent’s treatment of the members of the bargaining unit following certification, together with the fact that no mention was made in discussions with the complainant only three days earlier that the settlement obtained by the union would be used to justify a further layoff, the Board simply does not believe the explanation put forward by the respondent for its conduct on October 8th, and finds the layoff of Mr. Simmons to be in violation of section 66(a) of the Act. Mr. Simmons is therefore entitled to be reinstated with back pay.

22. The situation regarding Cathy Simmonds, as the Board noted earlier, is different. The concerns which the respondent had over the inclusion of its only secretary in the unit were expressed early, and were not without some foundation. The respondent agreed to wait, however, until her collective bargaining responsibilities became more imminent, and the Board must be circumspect in drawing a negative inference against the respondent because of that. While it was pointed out that both Mr. Hotston and his wife have some ability to type, the respondent is entitled to have the work of the Home performed by the employees of the Home. Having regard to the fact that Ms. Simmonds is the only secretary in the Home, and to the express reservations of the respondent at the time it agreed to leave Ms. Simmonds in the bargaining unit, the Board is not prepared to find that the decision to remove the secretarial position from the bargaining unit, at precisely the point that the respondent said it would have

to, is tainted by anti-union *animus*. Whether the exclusion is ultimately a sustainable one, on the basis of the duties and responsibilities of the position, is not the issue in the present case. It is only the issue of motivation that is before us. The most that can be said of the respondent's conduct in this regard is that, as with the layoff, the decision of the respondent to proceed when it did on Ms. Simmonds, without consulting or even alerting the trade union with whom it had just, it appeared, "cleared the air", was not only guaranteed to produce litigation, but demonstrates a labour-relations insensitivity that is likely to damage this employer's credibility at the bargaining table. The complaint with respect to Ms. Simmonds, however, must be dismissed. The Board does so on the basis of its finding that the removal of Ms. Simmonds from the bargaining unit was motivated by genuine business considerations, and not a desire on the part of the respondent to remove Ms. Simmonds from the protection of the complainant and the *Labour Relations Act*. Should facts arise subsequently which cast doubt on this conclusion, it remains open to the complainant to request reconsideration of this decision from the Board in the normal way.

23. The Board hereby directs the respondent to forthwith offer to reinstate Barry Simmons as a full-time employee of the Home, and to pay Mr. Simmons compensation for all loss of wages and benefits suffered as a result of his unlawful layoff, with interest in accordance with Board Practice Note No. 13. The Board will remain seized of this matter in the event the parties are unable to agree upon the amount of compensation so payable.

24. The respondent is further directed to sign and post a notice in the form of the Appendix hereto attached, in a place at the Home where employees are able to see it, and to keep this notice posted for 60 consecutive working days. Reasonable steps shall be taken by the respondent to ensure that the said notice is not altered, defaced or covered by any other material. Reasonable physical access to the premises shall be given by the respondent to a representative of the complainant to satisfy itself that this posting requirement has been and is being complied with.

25. The complainant has requested, in the light of the flagrant and persistent conduct of the respondent, that it be compensated for its costs of litigating this matter before the Board. The Board has already expressed its opinion of the manner in which the respondent has handled itself. Having regard, however, to the complainant's mixed success with respect to this complaint, and more so to the reasons given in *Radio Shack*, [1979] OLRB Rep. Dec. 1220, the request for costs is denied.

The Labour Relations Act

1762

NOTICE TO EMPLOYEES

Posted by Order of the Ontario Labour Relations Board

WE HAVE POSTED THIS NOTICE IN COMPLIANCE WITH AN ORDER OF THE ONTARIO LABOUR RELATIONS BOARD, ISSUED AFTER A SERIES OF HEARINGS ACCUSING THE COMPANY OF UNFAIR LABOUR PRACTICES. THE BOARD HAS FOUND THAT WE VIOLATED THE LABOUR RELATIONS ACT. WE WANT OUR EMPLOYEES TO KNOW THAT:

THE ACT GIVES ALL EMPLOYEES THE RIGHT

- (A) TO ORGANIZE THEMSELVES;
- (B) TO FORM, JOIN AND PARTICIPATE IN THE
LAWFUL ACTIVITIES OF A TRADE UNION;
- (C) TO ACT TOGETHER FOR COLLECTIVE BARGAINING;
AND
- (D) TO REFUSE TO DO ANY AND ALL OF THESE
THINGS, IF THEY WISH.

WE ASSURE ALL OF OUR EMPLOYEES THAT:

WE WILL NOT DO ANYTHING TO INTERFERE WITH THESE
LAWFUL RIGHTS THAT ALL EMPLOYEES ENJOY.

WE WILL NOT DISCRIMINATE AGAINST ANY EMPLOYEES
FOR PARTICIPATING IN THE LAWFUL ACTIVITIES OF
THE UNION, OR FOR ENGAGING IN FREE COLLECTIVE
BARGAINING WITH US THROUGH THE UNION.

WE WILL OFFER TO REINSTATE BARRY SIMMONS IN
FULL-TIME EMPLOYMENT IMMEDIATELY, WITH FULL
BACK-PAY AND INTEREST.

WE WILL BARGAIN IN GOOD FAITH WITH THE UNION AS
THE DULY CERTIFIED COLLECTIVE BARGAINING
REPRESENTATIVE OF OUR EMPLOYEES, AND MAKE EVERY
REASONABLE EFFORT TO MAKE A COLLECTIVE AGREEMENT.

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MANAGER

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1500-81-U Hotel, Restaurant & Cafeteria Employees Union, Local 75, Complainant, v. Constellation Hotel Corporation Ltd., Respondent.

Discharge for Union Activity – Unfair Labour Practice – Employee discharged for sexual harassment of female staff member – Company aware employee active in union campaign – Whether discharge devoid of any anti-union consideration

BEFORE: Kevin M. Burkett, Alternate Chairman and Board Members J. A. Ronson and S. Cooke.

APPEARANCES: *J. A. Ryder, Q.C. and Frank Ragni for the applicant; Stewart D. Saxe and George Kalmar for the respondent.*

DECISION OF THE BOARD; December 15, 1981

1. This is a complaint filed under section 89 of the *Labour Relations Act* alleging that the dismissal from employment of Mr. Tom Grougiannis on or about October 2, 1981 constitutes a violation of sections 3, 64, 66 and 70 of the Act.

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3. Mr. Grougiannis, who worked as a waiter in the Burgundy Room of the Constellation Hotel, received the following letter of termination dated October 2, 1981 signed by Mr. George Kalmar, president of the hotel:

“On the 18th of September 1981, I received a written complaint that you assaulted, insulted and embarrassed one of our female staff members.

As you are fully aware, this sort of behaviour is totally unacceptable to the management of this hotel. In spite of all this, on September 24th I requested your supervisor, Mr. Sandy Millar, to bring you to my office whereupon I informed you of the written complaint against you. I repeatedly requested at that meeting that you give me your version of the incident the same way in writing as the complainant has done. You consistently refused but said you will go home after work and then at home you will write me the reply and bring it in on Friday, September 25th. Your supervisor and I agreed to this procedure and I said to you that this will be satisfactory as long as I have your version in writing whether it is written here or in the privacy of your home, does not really matter. With this, the meeting was completed.

On Friday, September 25th, you did not show up for work, informing Mr. Millar that you were ill. The following next several days you phoned in again stating your wife has some medical problems and you cannot attend to your work. On Friday, October 2nd, you returned to work and I met you for a brief moment in the kitchen when I asked you if you have your written statement for me. You told me that you don't have it and you do not intend to give it to me.

Under the circumstances, since you repeatedly refused to give your version of the incident in writing, we regret that we have no alternative

but to assume the written complaint is the fact and based on this, we are terminating your services forthwith. Your supervisor, Mr. Millar will have your pay cheque and related documents for you.

4. Ms. Myra Kirkwood, a personnel assistant with the hotel, testified that on September 16, 1981 she was walking through the Burgundy Room in the course of her duties prior to the opening of the room for business. It is her evidence that Tom Grougiannis, a waiter known to her as Tom and with whom she had no previous conversations, called her over and asked her if she was excited. She testified that when she asked why he replied "because your nipples are standing out" and pulled her closer to him. Ms. Kirkwood testified that at this point she broke away and proceeded to carry on with her business. She testified that as she was passing through the Burgundy room next day Mr. Grougiannis again called her over and that she responded by telling Mr. Grougiannis to "to go hell".

5. Ms. Kirkwood was in Mr. Kalmar's office on Friday September 18th and told him of the incident with Mr. Grougiannis. Mr. Kalmar asked her to put her story in writing. She provided the following written statement:

Sept. 16, 1981

On the above date Mr. Tom Grougiannis, a waiter in the Burgundy Room, grabbed my upper arm with enough force so that I could not move. When I did try to back away he tightened his grip. He then said something very uncomplimentary to me. I do not feel that he or any other person is familiar enough with me to say something of that nature, and consequently I was both insulted and embarrassed by his manner & remarks.

6. Mr. Kalmar, who acknowledged that he was aware that Mr. Grougiannis was involved in a union organizing campaign which was then in progress, discussed the matter with his legal counsel for labour relations matters and with both the outgoing and the incoming general managers. He testified that he was concerned as to how the matter should be handled because of Mr. Grougiannis' union involvement but was told to proceed as he would in the normal course. He testified that he knew Mr. Grougiannis was involved in union organizing because a long service employee had informed him earlier in the summer that he had been approached by Mr. Grougiannis to sign a union card. Mr. Kalmar maintained that he knew of 6 or 7 others who were also involved in union activity. A prior unsuccessful organizing attempt had been made in the mid 1970's and it is Mr. Kalmar's evidence that he had always adopted a hands-off stance. In any event, following receipt of Ms. Kirkwood's written statement and the discussions with his advisors, he directed Mr. Sandy Millar, the Maitre'D in the Burgundy Room, to bring Mr. Grougiannis to his office. He testified that when Mr. Grougiannis was brought to his office he told him of the complaint against him and asked him to put his explanation in writing. Mr. Grougiannis refused, but said he would do it at home. Mr. Grougiannis called in sick the next day and for the remainder of that week. He testified that his wife took ill at the time and he had to be with her. He returned to work on October 2, 1981. When he failed to produce the written explanation for which he had been asked, the termination letter reproduced in para. 3 herein was prepared and he was terminated.

7. Mr. Grougiannis testified that he undertook on behalf of Mr. Frank Ragni, the paid

union organizer, to attempt to sign other dining room employees into membership and that he did in fact sign six other dining room employees into membership. The organizing campaign commenced in early July. He was called to a meeting with the hotel's general manager and Mr. Millar in late July and warned about harassing and molesting employees when he should have been working. He testified that he had attempted to sign employees into membership in the Woodbine Room but had done so before working hours. He did not tell the company officers at the time that his activities were being carried on outside working hours. He refused to sign the employee misconduct notice which referred to "certain harassment of employees within the hotel." He testified that Mr. Millar told him after the incident that he would be fired if he didn't stop. Mr. Millar was not cross-examined on this point. Mr. Grougiannis admitted he had told no one about this caution from Mr. Millar prior to the hearing. About a month later he was involved in another exchange with management. He testified that he had been working as the kitchen waiter preparing salads and carrying on the usual conversation with the ladies working in the kitchen when Mr. Millar came into the kitchen and said that he was to be sent home for talking to the ladies about the union. Mr. Millar testified that a complaint had been received from the sous chef that Mr. Grougiannis was bothering the ladies but denied that anything had been said about the union. He maintains that he told Mr. Grougiannis to do his work. Mr. Grougiannis completed the shift but was called to a meeting attended by Mr. Millar, Mr. Justice (the outgoing General Manager) and Mr. Go (Vice-President Operations) before the commencement of his shift the next day. The message he was given was to attend to his job. He was not disciplined and no threats were made to his job security.

8. Mr. Grougiannis' evidence with respect to the alleged misconduct for which he was purportedly terminated corresponds with that of Maja Kirkwood on all material points. He admitted that he knew Ms. Kirkwood by name only and further admitted that on the day in question he called her over as she passed through the Burgundy Room and said to her "do you feel excited about anything right now?" He testified that she smiled and he said "your chest shows it". He testified that he touched but did not grab Ms. Kirkwood and maintained that he had no indication that she was upset. His explanation for his actions was that "she was getting attention in the kitchen." His evidence with respect to the meeting which subsequently took place in Mr. Kalmar's office conflicts with that of Mr. Kalmar in that he maintains that he was greeted by Mr. Kalmar with the words "sit down before I throw you out the window for being a union organizer." Mr. Kalmar vigorously denied that he had said these words. Mr. Millar, who Mr. Grougiannis admitted was present, was not cross-examined on this point. As noted, Mr. Grougiannis was absent from work until Friday, October 2nd at which time he was terminated in the manner described.

9. Mr. Frank Ragni, the paid union organizer, was called to testify. It is his evidence that he commenced organizing in July and in the second week of July was approached by Mr. Kalmar and given an offer to take back to his union president. The offer, which is the same as that made to Mr. C. Ireton, the union organizer in the 1975 campaign, was that the organizing should stop and if all the hotels on the airport strip became organized Mr. Kalmar would agree to a voluntary vote of his employees. Mr. Kalmar testified that Mr. Belanger, the union president, was to call him if he was interested. There is no evidence that Mr. Belanger ever called Mr. Kalmar. The evidence is that on September 9th Mr. Kalmar was informed by Mr. Ragni outside the hotel that his offer had been refused. Mr. Ragni testified that prior to this date there had been no complaints about his presence on hotel property. However, he admitted in cross-examination that he had had contact with the hotel security guards prior to September 9, 1981 on a number of occasions and had been told to stay off the hotel property.

10. Following the taking of a vote ordered pursuant to a decision of this Board dated July 10, 1974, the applicant trade union asked for a "new" vote on the grounds of a violation of the Board's "no propaganda rule". By a decision dated November 19, 1974 the Board directed the taking of a second pre-hearing vote. Mr. Kalmar, as he is now, was president of the hotel at this time. The reasons cited in support of the Board's decision are set out in para. 12 of its decision:

"... In arriving at this conclusion, we have taken particular note of the following circumstances which would make these employees, who for the most part are immigrants, particular susceptible, viz.: the presence of management personnel in a strategic location in the vicinity of the polling area in full view of the employees as they proceeded towards the ballot box; some employees were spoken to by these persons as they entered the Constellation Room; Arlette's actions in initially checking off the employees' names as they proceeded to vote; the commotion generated by both the applicant and the respondent in the vicinity of the Constellation Room which on two occasions required the intervention of the Returning Officer; the 'cloak and dagger' scenario during which officials of both the applicant and the respondent surveyed each other's activities while on the general premises of the hotel; and finally the presence as Scrutineers of relatively high ranking officials on behalf of both the applicant and the respondent. (In this latter regard, see Paragraph 2(g) of the 'Registrar's Instructions Regarding Vote' and the statements of the Board in the *J.R. Menard Ltd.* Case (1972) OLRB M.R. 915 at page 916)."

As in the first vote the applicant union did not receive support sufficient for certification. There were no unfair labour practice charges filed in connection with the organizing campaign which culminated with the above referred to vote.

11. The essence of the company submissions is that the grievor, Mr. Grougiannis, committed an act of misconduct which warranted discharge and on all the evidence it is clear that the company acted in response to Mr. Grougiannis' misconduct and not to his union activity. In the absence of any prior unfair labour practice charges, either in connection with this campaign or the last, and in circumstances where the management and the owner of the hotel knew Mr. Grougiannis was a union supporter from the end of July and had counselled him on two prior occasions with respect to being away from his work station, the company argues that it cannot be inferred that it terminated this man at this time because of his union activity and not because of his misconduct. The company argues that where Mr. Grougiannis' testimony is in conflict with that given by the witnesses called by the company it is the company witnesses who should be believed. In particular, the company referred to the testimony of Mr. Grougiannis that Mr. Miller had told him to stop his organizing efforts or he would be fired and to his testimony that Mr. Kalmar told him on September 18th he should throw him out the window for his union organizing. The company asks the Board to take note of the fact that neither statement is referred to in the particulars filed in advance of the hearing and that Mr. Millar was not cross-examined in respect of either the statement he allegedly made or the statement that was allegedly made in his presence. The company maintains the statement attributed to Mr. Kalmar is so improbable in the circumstances that the grievor's evidence should be disbelieved on this ground alone. The company asks the Board to conclude that it

acted in response to Mr. Grougiannis' sexual harassment of Ms. Kirkwood and for no other reason.

12. The union characterizes the issue as one of deciding whether Mr. Grougiannis would have been dismissed had it not been for his union organizing. The union asks the Board to conclude on the evidence before it that the company adopted an anti-union posture through July, August and September; that the company knew the grievor was a union organizer; that the company, as evidenced by the meetings which it held and the discipline it attempted to impose on Mr. Grougiannis, harassed Mr. Grougainnis; and that the company adopted an anti-union stance in 1974 as recorded in the earlier Board decision. In the face of Mr. Kalmar's evidence that he was aware of only one prior incident involving Mr. Grougiannis (not two), his characterization of the misconduct associated with the vote which was held in 1974 and his evidence that he did not make the voluntary vote offer to Mr. Ireton until after the Board sanctioned votes in 1974 (which the union characterizes as improbable), the union asks the Board to find that Mr. Kalmar, the decision maker, was not a credible witness. The union asks the Board to conclude that the complaint registered by Ms. Kirkwood was not sufficiently serious to warrant dismissal and that the evidence led by the Hotel with respect to its decision to dismiss Mr. Grougiannis is not a reliable basis upon which to conclude that the decision to discharge was divorced from anti-union consideration. The union argues that the termination of Mr. Grougiannis was motivated, at least in part, by anti-union considerations and therefore, constituted a violation of the Act.

13. Section 89(5) of the Act stipulates:

"On an inquiry by the Board into a complaint under subsection (4) that a person has been refused employment, discharged, discriminated against, threatened, coerced, intimidated or otherwise dealt with contrary to this Act as to his employment, opportunity for employment or conditions of employment, the burden of proof that any employer or employers' organization did not act contrary to this Act lies upon the employer or employers' organization."

14. The Board reviewed the general principles which govern in a case where the reverse onus established under section 89(5) applies in the recently reported *Alpha Laboratories Inc.* case [1981] OLRB Rep. July 823. The Board reviewed these principles at para. 3 as follows:

"In the *Barrie Examiner* case, [1975] OLRB Rep. Oct. 745, the Board stated:

'... the effect of the reversal of the onus of proof is to require the employer to establish two fundamental facts. First, that the reasons given for the discharge are the only reasons and, second, that these reasons are not tainted by any anti-union motive. Both elements must be established on the balance of probabilities in order for the employer to establish that no violation of the Act has occurred.'

It is not the function of the Board in the present case to decide whether or not the respondent had just cause to discharge the grievors. Our jurisdiction is limited to determining whether the respondent discharged

the grievors because they were supporters of the complainant trade union or were exercising any other rights under the Act (see *Toronto Star Limited*, [1971] OLRB Rep. Sept. 582, paragraph 11). This does not, however, preclude the Board from considering the context surrounding the respondent's actions, as indicated by the Board in *Fielding Lumber Company* [1975] OLRB Rep. Sept. 665, at paragraph 19:

'The Ontario Labour Relations Board has no general mandate to impose its views of fairness on employers and employees. Its sole responsibility is to administer and enforce *The Labour Relations Act* — a piece of legislation that does not stipulate that an employee can be terminated from his employment only for just and reasonable cause. But having said this it must be observed that in assessing an employer's declared motivation due regard may be had to the peculiarities of the context surrounding an employer's action. To the extent that peculiarities exist and cannot be reasonably explained an employer may fail, by a process of inferential reasoning, to satisfy the burden placed upon it.'

The nature of the determination to be made in cases such as the instant case and the factors to be considered by the Board in making such determinations are described as follows in *Pop Shoppe (Toronto) Limited*, [1976] OLRB Rep. June 299, at paragraph 5:

'In cases such as these the Board is very often required to render a determination based on inferential reasoning. An employer does not normally incriminate himself and yet the real reason or reasons for the employer's actions lie within his knowledge. The Board, therefore, in assessing the employer's explanation must look to all of the circumstances which surround the alleged unlawful acts including the existence of trade union activity and the employer's knowledge of it, unusual or atypical conduct by the employer following upon his knowledge of trade union activity, previous anti union conduct and any other 'peculiarities'. (See *National Automatic Vending Co. Ltd.* 63 CLLC ¶16,278). ...'

With those general principles in mind, the Board must now consider the facts of the present case."

15. It is clear on the evidence that Mr. Grougiannis engaged in an act of gross misconduct when he sexually harassed Ms. Kirkwood. Indeed, he admitted to this misconduct in his own evidence. This type of misconduct provides grounds in itself for a severance of the employment relationship. There is no evidence to suggest that this type of misconduct has ever been condoned in the hotel or that it has ever been met with a sympathetic management response. The evidence is that one other such incident had been brought to the attention of management and the person involved resigned his employment immediately. It is against the backdrop of Mr. Grougiannis' misconduct that we must decide if he was terminated solely because of his misconduct or whether his misconduct was used, either in whole or in part, as a pretext to terminate his employment for anti-union reasons.

16. Mr. Kalmar and the other, company officials admitted knowledge of Mr. Grougiannis' trade union support and activity. Furthermore, it is clear on the evidence that Mr. Kalmar, the president and owner of the hotel, would prefer to operate without a trade union. The offer which he made to Mr. Ireton in 1974 and the making of the same offer at the outset of this organizing campaign, evidences such a preference. The meetings which were held with the grievor at which he was warned to stop harassing other employees and to remain at his work station during working hours, although not necessarily acts proscribed by the Act, also evidence a management preference not to be unionized. However, the preference of an employer to operate union free does not in itself support a finding that the employer is prepared to or has unlawfully threatened those who actively pursue the right to unionize.

17. In this case there is no prior conduct by the employer within this organizing campaign or in the previous one, which suggests that he is prepared to threaten the employment of those who pursue unionization. The findings of the Board in the earlier reported case (see para. 14 herein) are essentially in respect of voting irregularities and do not support the inference which the union asks us to draw. Having assessed the witnesses as they gave their evidence, and having weighed the evidence given against what best accords with reason and common sense in the circumstances we accept the denial of Mr. Kalmar that he threatened to throw Mr. Grougiannis out of the window for his union activity. Furthermore, we are not satisfied that Mr. Millar warned Mr. Grougiannis that he would be fired if he kept up his union activities. The union attempted to link the timing of Mr. Grougiannis' discharge to the information given to Mr. Kalmar on September 9, 1981 that the offer he had made to Mr. Bellanger had been rejected. Mr. Ragni testified in chief that from this point forward the attitude of the hotel management changed. However in cross-examination he admitted that well before September 9th he had been warned to stay off hotel property. Mr. Grougiannis had also been spoken to before September 9th. The evidence does not support the conclusion that the attitude and approach to the company changed after September 9th. The timing of Mr. Grougiannis' termination relates directly to the company's knowledge of his misconduct. When reference is had to the very serious nature of his misconduct and to the other evidence before us we are satisfied that he was terminated for his misconduct and for no other reasons.

18. Accordingly, this complaint is hereby dismissed.

1203-81-R Energy and Chemical Workers Union, Local 300, Applicant, v. Ethyl Canada, Inc. and F.I.R.M., Respondents, v. United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 663, Intervener.

Practice and Procedure – Related Employer – Respondent requesting dismissal of application without hearing evidence – Relying on delay by union and alleged related employer's pre-existing bargaining rights – Whether matters raised preliminary or going to merits

BEFORE: R. O. MacDowell, Vice-Chairman, and Board Members W. H. Wightman and D. B. Archer.

APPEARANCES: *Daniel Ublansky, C. S. Sullivan and T. Richardson for the applicant; Edward T. MacDermott and W. Hoad for Ethyl Canada, Inc.; Joseph Carrier and Norman Fairbairn for F.I.R.M.; L. C. Arnold and W. Robb for the intervener.*

DECISION OF THE BOARD; December 23, 1981

1. This is an application under section 1(4) of the *Labour Relations Act*. The respondents seek a preliminary ruling of the Board dismissing the application without hearing any further evidence.

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3. Ethyl is a manufacturer of industrial and pharmaceutical chemicals in Sarnia, Ontario. F.I.R.M. is a mechanical subcontractor which performs certain work for Ethyl which the applicant union contends is work which should properly be done by Ethyl's own maintenance employees. It is unnecessary to detail the evidence which has already been adduced before the Board. The respondents argue that on the basis of that evidence — and in particular the evidence respecting F.I.R.M.'s preexisting bargaining rights and the applicant's delay in launching this proceeding — the application cannot possibly succeed because the Board would not exercise its discretion to make a section 1(4) declaration even if the conditions precedent therefor were met. The union acknowledges that a section 1(4) order is discretionary but contends that a dismissal at this stage of the proceedings would be premature. The union argues that it should be given the opportunity to lead evidence and make argument concerning all outstanding issues, including the exercise of the Board's discretion. These issues are not "preliminary" in the sense suggested by the respondents, and it would be unfair to truncate the proceeding at this point, before the union has had an opportunity to put in its case.

4. We have carefully considered the submissions of the parties. There is considerable force to the respondents' argument. A union which is aware of an erosion of its bargaining rights must move promptly to file a section 1(4) application. If it does not do so within a reasonable period of time, and does not have a good explanation as to why it waited, the Board will seldom grant relief under section 1(4). Similarly, the Board has been disinclined to make a section 1(4) declaration which would have the effect of disturbing the pre-existing bargaining rights of the related employer. However, we accept the union's submission that neither of these issues are "preliminary" but rather, they go to the heart of the section 1(4) application. Accordingly, we are not prepared to dismiss the application at this stage without hearing the rest of the case, including any evidence or argument which the union wishes to make.

0012-81-R Hotel, Restaurant & Cafeteria Employees Union — Local 75, Applicant, v. Filkon Food Services Limited c.o.b. as By The Way Frozen Yogurt, Respondent.

Bargaining Unit – Build-Up – Whether alteration to physical premises factor in build-up – Whether seasonal fluctuations causing Board to defer certification.

(Editorial note: This decision was inadvertently omitted from the May, 1981 issue of the Report. However, it is of sufficient importance to be published at this time)

BEFORE: M. G. Mitchnick, Vice-Chairman, and Board Members J. D. Bell and O. Hodges.

DECISION OF THE BOARD; May 14, 1981

1. This is the continuation of an application for certification.
2. The parties at the initial hearing agreed that two bargaining units were appropriate, one relating to the full-time employees (bargaining unit #1), and the other to part-time employees and students employed during the school vacation period (bargaining unit #2). The Board in its decision of April 30, 1981 certified the applicant for the full-time unit. The unit of part-time employees and students remains to be dealt with. The respondent's objection to certification of the second unit is based on the Board's so-called "build-up" principle; that is, that this is not a representative time to ascertain the wishes of the employees in the part-time bargaining unit.
3. The respondent has been in operation for 3 years, and presently employs 6 part-time employees in its restaurant outlet. This is its normal complement of part-time employees. For the first time this summer, however, the respondent will be operating an outdoor cafe area, which will require the hiring by the end of June an additional 12 students to work outside, plus 4 more students to work inside. This outdoor operation will also require some modification to the respondent's premises. The summer café has not been operated in prior years because the respondent had, until now, been unable to obtain from the building's owner the kind of long-term lease which would justify the cost of renovations. The respondent points to these actual changes to the physical premises as the factor which brings this case within the "build-up" principle.
4. The alteration of physical premises, however, has never been a factor in the Board's application of its "build-up" principle. Rather, the Board's sole concern is whether the employee complement at the time of an application for certification is "representative" of the full complement on an ongoing basis (see, e.g. *Atlantic Packaging*, [1980] OLRB Rep. Feb. 158, paragraphs 8 and 9). What the respondent is relying upon in this case is a purely seasonal fluctuation in its work force, involving the increased use of students in the summer. The Board has never held that an application for certification which includes summer students must be brought in the summer. More importantly, the Board has consistently refused to take into account seasonal fluctuations in a work force, from the point of view of either "build-up" or bargaining-unit configuration, outside of certain historically-recognized industries such as canning and tobacco-harvesting (see *Universal Cooler*, [1967] OLRB Rep. Sept. 546; *Melnor Manufacturing Ltd.*, [1976] OLRB Rep. May 215). The Board in most instances, in other words, does not take into account the normal ebb and flow of the work force. That is all that is

occurring in the present case, albeit for the first time because this is the first year the respondent will be operating on a "seasonal" basis.

5. The present complement of 6 part-time employees is, as the applicant points out, in fact representative of the bargaining unit, even *with* the seasonal fluctuation, for approximately 10 months of every year. The Board is not of the view that the desire of a "permanent" complement of part-time employees for collective bargaining (even recognizing that such employees may themselves be "students") ought to be deferred in a case such as this to await the determination of the wishes of additional students employed only during the school vacation period. The Board therefore declines to exercise its discretion under section 7 of *The Labour Relations Act* to defer further processing of the present application.

6. The Board is satisfied on the basis of all the evidence before it that more than fifty-five per cent of the employees of the respondent in bargaining unit #2 at the time the application was made were members of the applicant on April 13, 1981, the terminal date fixed for this application and the date which the Board determines, under section 92(2)(j) of *The Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

7. A certificate will therefore issue to the applicant for all employees of the respondent at By The Way Frozen Yogurt in the Municipality of Metropolitan Toronto regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period, save and except supervisors, persons above the rank of supervisor, office and sales staff, in accordance with its finding at paragraph 4 of its decision dated April 30, 1981.

**0012-81-R Hotel, Restaurant & Cafeteria Employees Union —
Local 75, Applicant, v. Filkon Food Services Limited c.o.b. as By The
Way Frozen Yogurt, Respondent.**

**Bargaining Unit – Build-Up – Reconsideration – Board having refused deferrment on basis
of build-up – Whether information as to turnover rate and pattern of employment of part-timers
grounds for reconsideration**

(Editor's note: This decision was inadvertently omitted from the August, 1981 issue of the Report. However, it is of sufficient importance to be published at this time)

BEFORE: M. G. Mitchnick, Vice-Chairman and Board Members J. D. Bell and O. Hodges.

DECISION OF THE BOARD; August 24, 1981

1. This is an application for certification in which the Board certified the applicant in separate decisions for both a "full-time" and a "part-time" unit. The respondent by letter dated July 15, 1981, now asks the Board to reconsider its decision with respect to the latter. The text of the letter is as follows:

On May 14, 1981, the Board issued its decision in the above-noted

Application for Certification in which it certified the Union. This bargaining unit involved a group of restaurant employees comprised of full-time, part-time, and the summer students. The parties agreed there should be two separate bargaining units. The Respondent argued that as it planned to open an outdoor cafe in the summer of 1981, which opening would result in a significant increase in the number of employees in the part-time and student bargaining unit, the Board should apply its normal build-up principle and thereby defer consideration of the Application until the planned build-up was completed. The Board found at page two of its decision:

“The Board in most instances, in other words, does not take into account the normal ebb and flow of the work force. That is all that is occurring in the instant case, albeit for the first time because this is the first year the respondent will be operating on a “seasonal basis”.

The Board went on to find that the part-time employees then employed were representative of the bargaining unit and therefore decided not to defer consideration of the application. As a result, two certificates were issued by the Board.

The Respondent has carefully considered the Board’s reasons for issuing a certificate covering the employees employed for not more than twenty-four hours per week and the students employed during the school vacation period, and having done so, would ask the Board to reconsider that decision based on the following representations.

The Respondent submits when as in this instance, the Board chooses to combine part-time employees and students into one unit, it has a duty to exercise due regard for the interests of both groups. The interests of one group cannot be considered to be subordinate to the interests of the other. If the Board finds it cannot respect the interests of both groups equally in a one unit situation, then it is the respectful submission of the Respondent that the part-time and summer student employees should be separated into two units in order to ensure that an equitable result is obtained.

The Board states in Paragraph 5 of its award dealing with this matter that it is “not of the view that the desire of a “permanent” complement or part-time employees for collective bargaining (even recognizing that such employees may themselves be “students”) ought to be deferred in a case such as this to await the determination of the wishes of additional students employed only during the school vacation period.” This summation of the circumstances surrounding the case at hand is somewhat illusory, in the Respondent’s submission, on three separate heads:

1. The “permanent” complement of part-time employees is subject to the high rate of turnover typical for this industry.

2. Some of the additional students employed "only during the school vacation" may well stay on or return at a later date to replace those part-time employees who leave.
3. The length of time employed (especially in regard to the summer students) should not be a consideration, at least in industries subject to high rates of turnover.

As noted in points 1 and 2, some summer students may quite possibly be employed for as long as or longer than some part-time employees. To assign them a lesser weighting than part-time employees is unjust and flies in the face of the spirit and intent of the Labour Relations Act as evidenced in the Preamble.

"Whereas it is in the public interest of the Province of Ontario to further harmonious relations between employers and employees by encouraging the practice and procedures of collective bargaining between employers and trade unions as *the freely designated representatives of employees.*"

The Board, in proceeding as the decision set out, completely ignores the desires of what will be approximately 67 per cent of the employees in that particular bargaining unit. In the Respondent's respectful submission, the Board appears to be proceeding in this manner on the invalid supposition that while the individuals falling within the summer student category will only be there for a limited duration, the part-time employees will be there permanently. When one reflects upon the reality of the situation, bearing in mind the previously-noted high rate of turnover, it becomes clear that the premise is inaccurate and results in an injustice to the "summer vacation" student employees.

It is submitted that in instances such as this case where;

- (a) the size and date of the build-up are certain; and
- (b) the industry is subject to a high rate of turnover,

the Board should, in the interest of equitable treatment of all employees involved in the bargaining unit, alter its policy as expressed in the decision in a bargaining unit comprised of *only* part-time employees and students employed during the school vacation period. The Respondent need not remind the Board of its more realistic approach on Applications for Certification for seasonal employees in the canning and tobacco industries. It is respectfully submitted that these two situations are comparable and as such, the Board should reconsider its earlier decision not to invoke the build-up principle and thereby delay consideration of this Application until the number of employees in the unit has reached a more truly representative figure of at least more than 50 per cent of the number of employees to be employed in the bargaining unit. This, it is submitted, would be the only fair and consistent approach.

In summary, the Respondent submits that the build-up of the part-time and summer student bargaining unit is *not* a cyclical fluctuation as found by the Board, but rather, a permanent build-up of the bargaining unit for which a certificate was issued.

2. The policy grounds for combining part-time employees and vacation students in a single bargaining unit are set out by the Board in *Plummer Memorial Hospital*, [1979] OLRB Rep. May 433. In the present case the description of the bargaining units reflected as well the agreement of the parties, the second unit being made up of persons regularly employed for not more than 24 hours per week, and students employed during the school vacation period. In dealing with units which include students employed during the school vacation period, the Board historically has not permitted a cyclical increase in the number of students to be employed during that period to cause the deferral of an application for certification made at a time other than that period. With respect to the instant application, the Board noted in its original decision that the number of persons employed at the time the application was made is representative of the employee complement in the unit for approximately ten months out of every year. The respondent now asks the Board to reconsider on the basis of findings and assumptions as to the rate of turnover and the pattern of employment of part-time employees at this establishment, which, even if material, are not supported by any evidence presented to the Board at the hearing.

3. Having reviewed the submissions of the respondent, the Board finds no basis to reconsider its decision of May 14, 1981, wherein it refused to exercise a discretion to defer immediate processing of an otherwise timely application.

1095-81-U Frank Manoni and Lise Manoni, Complainants, v. Labourers' International Union of North America, Local 527, Respondent.

Duty of Fair Representation -- Practice and Procedure -- Trade Union -- Unfair Labour Practice -- Whether person outside bargaining unit having status to allege unfair representation -- Whether sex discrimination contravening Act -- Whether union resorted to intimidation and coercion in conduct of union elections -- Board discussing circumstances in which it will regulate internal union affairs

BEFORE: M. G. Mitchnick, Vice-Chairman, and Board Members J. D. Bell and B. L. Armstrong.

APPEARANCES: *Frank Manoni and Lise Manoni on their own behalf; A. M. Minsky and N. Scipioni for the respondent.*

DECISION OF THE BOARD; December 23, 1981

1. This is a complaint under section 89 of the *Labour Relations Act*, alleging a violation by the respondent trade union of what are now sections 1(1)(p), 66(c), 68, 70 and

80(2) of the Act. At the hearing the complaint with respect to sections 66(c) and 80(2) was withdrawn. The respondent applies to the Board to dismiss the remainder of the complaint pursuant to section 71 of the Board's Rules of Practice, on the ground that no *prima facie* case for relief is made out.

2. The complainant Frank Manoni was, for a period in excess of 20 years, the Business Manager of the respondent Local. Following Local elections in June of 1981, he was replaced in that capacity by Nello Scipioni, formerly a Vice-President of the Local. Lise Manoni, the second complainant, is Frank Manoni's wife.

3. The complainants have filled a statement of material facts with their complaint, amplified at the hearing, and which may be paraphrased as follows:

- (1) In March of 1981 a Mr. Roy was permitted to join and participate in the regular activities of the Local, even though not employed "in the calling" as required by the Local's constitution.

In August 1980, a Mr. Marineiro was similarly treated, although not employed "in the calling", and subsequently permitted to run for office.

Lise Manoni, also not employed "in the calling", tendered her dues and initiation fee to the Local but was told she could not be present at a regular meeting of the Local on June 17, 1981. She was then permitted to remain at the meeting, but only as a "guest". The same night she was expelled from the Local Union.

The complainants argue that the above demonstrates a violation of section 13 of the Act, involving discrimination on the basis of sex.

- (2) In May of 1981, a member of the Local, Mr. Drolet, was expressing his opinion on matters related to the respondent Union's administration. Mr. Scipioni told Mr. Drolet that he would see to it that Drolet lost his membership with the Union and his job.

This the complainants allege is a violation of sections 3 and 70 of the Act.

- (3) In December of 1980, Mr. Botelho, a member of the Local, was speaking at a regular meeting when he was shown a knife and was told to stop speaking. Mr. Botelho cannot identify the person holding the knife by name, but the complainants claim to be able to identify the person as a member of the faction supporting Mr. Scipioni.

In April of 1981 the complainant Frank Manoni was speaking as Business Manager at a membership meeting, when Mr. Scipioni, the Vice-President, attempted to physically assault him in the presence of all the members. Other attempts to physically assault

Mr. Manoni were made by Mr. Scipioni in September and November 1980. Both Mr. Scipioni and Mr. Bernard Carrozzi indicated to Mr. Manoni that his life was in jeopardy.

The complainants claim the above to be a violation of sections 68 and 70 of the Act.

- (4) In May of 1981 the judges of the Local's elections, after disqualifying certain proposed candidates, declared the remaining candidates elected by acclamation, contrary to the Local's constitution and objections by members.

This the complainants claim is a violation of section 1(1)(p) and 68 of the Act.

- (5) At the election of June 13, 1981, the same judges prevented the appointed "watchers" (i.e., scrutineers) from fulfilling their functions under the constitution. The judges were directed by Mr. Bernard Carrozzi (the newly-elected Recording Secretary of the Local) to order the watchers away from the polling area. When the watchers refused to move, they were told by the judges they would be expelled from the Hall. Over their protests, the watchers were not permitted to view the casting or the counting of the ballots. After the election the ballots were destroyed by the judges, contrary to the constitution, so that the results of the election could not be verified.

The complainants allege this to be a violation of sections 1(1)(p), 68 and 70.

- (6) As a result of the above, Mr. Scipioni took over the office of Business Manager and changed the keys of the Union Office.

4. The complainants request:

- (1) A cease-and-desist order in relation to intimidation and coercion.
- (2) Reinstatement in membership of Mrs. Manoni, with compensation.
- (3) An order to re-establish the legal status of the respondent Union by reinstating the incumbent officers pending new elections, with compensation for time lost and damage.

5. An appeal to the General Executive Board in Washington was launched under the International constitution by Mr. Manoni and others, concerning the alleged irregularities in the election. A hearing was conducted by the "Central Hearings Panel", at which both Mr. Manoni and a Mr. Batista appeared in support of the appeal. Mr. Scipioni and Mr. Carrozzi appeared on behalf of the Local. The Panel, after considering the evidence and documents presented, found:

- (1) That contrary to the contentions of Appellants Bastien and Batista, the Judges of Election were impartial and appeared to be qualified and to have acted in good faith and in accordance with the requirements of the Constitution and the Canadian law.
- (2) That, as contended by the Appellants, the Local Union erred in proceeding to declare certain candidates elected by "acclamation" where disqualifications of various candidates occurred and the membership was not provided with the opportunity to make further nominations to fill vacancies created by such disqualifications.
- (3) That, as a result of the foregoing irregularities which may have affected the outcome of the election, it will be necessary for the Local Union to re-run the nominations and provide an election for all offices and delegates to the District Council for Local Unions 527 and 527A.
- (4) That, in view of the foregoing, the other allegations need not be considered.

6. The Panel therefore recommended:

That the appeal be sustained and that the Local Union, after due notice in accordance with provisions of the Uniform Local Union Constitution, provide for the nomination and election of officers and delegates to the District Council, and that said procedures be supervised by such International Union personnel as may be designated by the General President.

This recommendation was adopted by the General Executive Board on July 17, 1981.

7. Rather than implementing new elections, however, the respondent Union appealed, as was its right under the International constitution, to the General Convention of the International. The regular General Convention meets only once every five years, but, as it happens, was being held in Florida on September 14-18, 1981. It is not clear who attended the Convention on behalf of the respondent Union to present the appeal. Mr. Manoni himself did not attend because, he states, the cost of travelling to Florida, with his witnesses, was prohibitive. The Convention considered only the ground of declaring persons elected by acclamation, and, as the positions of Business Manager and Recording Secretary had not been affected by this irregularity, sustained the respondent's appeal with respect to these two positions. Re-elections for all other positions in the Local are now to proceed as directed by the General Executive Board.

8. It is against this background that the complainants come to the Board for relief. Dealing firstly with the allegations under section 68, the complainants' primary argument is that the misconduct and constitutional irregularities in this case are so profound as to place in jeopardy the very status of the respondent as a "trade union" under the Act, to the potential detriment of all of its 2,000 members. Hence the reference by the complainants to section 1(1)(p), the definition of "trade union" under the Act. The complainants rely on cases such as *J. Harris*, 60 CLLC ¶16,177; *Tridon Ltd.*, [1974] OLRB Rep. Jan. 16, and *All Bright*, [1972]

OLRB Rep. Aug. 784 to demonstrate the Board's jurisdiction on the "status" issue, and submit that these cases establish the proposition that the failure to elect officers in accordance with a trade union's constitution can cause the organization to lose its status before the Board.

9. In answer to the complainants' argument, it can be observed that the Board does have certain requirements it considers necessary to the granting of "trade union" status under the Act, in order to ensure that such entities are ongoing, viable and capable of carrying out their responsibilities under the Act. The proper election of officers has always been one of them. The "status" issue does not, however, exist under the Act as an issue in itself. It only arises in the context of representation applications, where an organization is seeking bargaining rights before the Board for the first time, or is asserting bargaining rights as a bar to the acquisition of those rights by another organization. The mere failure to meet the Board's requirements for status does not, in other words, constitute an offence under the Act, and the simple definition of a "trade union" in section 1(1)(p) does not alter that. If the complainants are to succeed on this branch of their complaint, they must do so on the basis of section 68 alone.

10. Section 68 provides:

A trade union or council of trade unions, so long as it continues to be entitled to represent employees in a bargaining unit, shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit, whether or not members of the trade union or of any constituent union of the council of trade unions, as the case may be.

The first problem facing the complainants in this regard is that neither of them are employees *in a bargaining unit*. This is more than a technicality. The section is an outgrowth of what certain American cases, such as *Vaca v. Sipes* (1967), 386 U.S. 171, described as "the duty of fair representation", and is concerned with the representation of employees *with their employer*.

11. This precise point was dealt with by the Board in *Arthur Joseph Roberts v. Operative Plasterers' and Cement Masons' International Association of the United States and Canada, Local 48*, [1974] OLRB Rep. Mar. 169, in which the complainant, an elected business agent of the Local, complained that he was arbitrarily removed from office. The Board stated, at paragraph 8:

... the duty of fair representation owed by a trade union to an employee under section 60 (now section 68) of the Act does not contemplate controlling the manner in which a trade union conducts its affairs with its elected officials whether they be on the payroll or not. The case law indicates that the propriety of a trade union's behaviour vis a vis its members is governed by its constitution and by-laws and the procedural remedies provided therein. And recourse must be made by an aggrieved member of the governing rules provided under the constitution for relief. The safeguard provided by the controlling supervision of the courts are his assurance that these rules will be implemented fairly and impartially. (See *White v. Kuzych* (1951), A.C. 585; *Lee v. Showmans Guild* (1952),

All. E.R. 1175; *Orchard v Tunney* (1957), S.C.R. 436; 8 D.L.R. 273; *Jurak et al v Cunningham* (No. 1) (1959), 20 D.L.R. (2d) 377; *Jurak et al v Cunningham* (No. 2) (1959), 20 D.L.R. (2d) 381; *Gee v Freeman et al* (1958), 26 W.W.R. 546).

The Board went on to hold, at paragraph 20, that “under section 60 a trade union’s duty of fair representation does not extend to members in good standing who are not employees in a bargaining unit”. To a similar effect, see *Gale Douglas Devereaux*, [1975] OLRB Rep. Nov. 885, at paragraph 9. It should be added that even if brought by persons currently employed in a bargaining unit (and the complainants claim to “represent” a number of such persons), the present complaint still would be misconceived under section 68. The arbitrary, discriminatory or bad faith conduct directed at such employees and regulated by the section must be such as to produce actual, and not merely speculative prejudice to those employees *at the hands of their employer*.

12. In light of the foregoing, the Board need not comment on the other questions which the present complaint raises with respect to the scope and purpose of section 68. The complaint insofar as it alleges a violation of section 68 is dismissed.

13. Paragraph 1 of the complaint’s statement of material facts compares the treatment afforded by the respondent to two male employees, Mr. Roy and Mr. Marineiro, with that afforded to Lise Manoni, and alleges this to establish a violation of section 13 of the Act. That section reads:

The Board shall not certify a trade union if any employer or any employers’ organization has participated in its formation or administration or has contributed financial or other support to it or if it discriminates against any person because of his race, creed, colour, nationality, ancestry, age, sex or place of origin.

The complainants allege that they were told by a member of the Union Executive that Mrs. Manoni was expelled from membership because of her sex. However, as can be seen, while section 13 has the effect of barring certification in a representation proceeding, it does not create an offence of sexual discrimination *per se*. The result is that the complainants’ allegation under section 13, even if established, would not make out a violation of the Act. The complaint under section 13 is accordingly dismissed.

14. Counsel for the respondent submits that the remainder of the complaint can be put no higher than an allegation that the respondent’s constitution has been violated in various respects. Counsel points out that the Board in the past has made it clear it does not assume a “watchdog” role with respect to a Union’s internal proceedings, and that that, in any event, is a matter for the Union’s internal appeal procedures, together with the Courts in necessary (*A. J. Roberts, supra*; *Moreira v. Labourers’ International Union of North America, Local 506 and Labourers International Union of North America v. Ontario Hydro*, [1980] OLRB Rep. July 1039; *Howard v. Parrinton*, [1971] 3 O.R. 659 (S.C.O.)). Counsel points out, in addition, that the present complaint has already been carried to the highest levels of the International’s appeal procedures, and disposed of, and that the complainants ought to be required to live with the results.

15. The first problem with the respondent's position is that the bulk of the Manonis' charges were *not* dealt with in the full appeal procedure. It is not clear from the report of the Central Hearing Panel exactly which issues were dealt with by the General Executive Board, but, in any event, it is clear that the only issue considered at the Convention level was that of acclamation following disqualifications. It will be recalled that the appeal to the Convention was taken up on that ground alone, not by the Manonis or their associates, but by the Local.

16. There is, in addition, some question whether the policy of deferral to internal appeal procedures referred to in many of the cases is anything more than a question of pre-maturity; i.e., one simply requiring that the internal appeal procedures be *exhausted* before moving to an external forum (see *U.A., Local 46*, [1974] OLRB Rep. Aug. 569; *Amalgamated Transit Union, Local 113*, [1979] OLRB Rep. Oct. 917, and the cases cited therein), and this has already taken place in the case before the Board. Beyond this, the Board has always taken into account matters of fairness and practicality in deciding whether to defer to internal procedures. As the Board went on to note in *Amalgamated Transit Union, Local 113, supra*, at paragraph 6:

... if the issue involves a violation of public policy, if the alternate remedy is illusory in that it provides inadequate relief *or if the speed, economy and convenience* of the internal remedy is not approximately equivalent to the remedy available through the Board, it is unlikely that the internal remedy would be deemed satisfactory so as to cause the Board to defer...
(emphasis added)

In the present case, the timing of the General Convention (which occurs once in five years) did, by chance, afford a speedy forum for relief. The location, however (in Florida), can fairly be said to have raised significant cost restrictions on the complainants' ability to prosecute their charges fully, with the attendance of all of their potential witnesses. It was, in addition, not their appeal at that point, their own appeal having been totally successful on another ground at the General Executive Board level.

17. Finally, there is in the background to any question of deferral, as the Board noted in *Amalgamated Transit, supra*, the broad question of public policy. As Rand, J., noted in *Orchard v. Tunney* (1957), S.C.R. 436, at page 44, commenting on the self-government of voluntary associations like trade unions in the early days of the Court's evolving policy of intervention:

... In a degree depending upon the nature of their objects, they have been left largely to their own government on the ground, probably, that it is better to let family affairs settle themselves; but as they have evolved and membership has taken a greater economic importance resort to the Courts has become more frequent and the warrant for juridical interposition to prevent injustice has called for a more critical analysis of the jural elements involved.

18. From the point of view of the Labour Board, however, all of this depends upon a complaint making out a *prima facie* violation of the *Labour Relations Act*. The Board does not enjoy the inherent jurisdiction of the Courts; it derives its jurisdiction from the statute which created it. As the Board noted in *Mario Moreira*, [1980] OLRB Rep. July 1039, "this

Board has no specific authority under the Act to undertake any sort of watchdog role over a union's internal processes under its constitution and by-laws". To the extent that a complaint relies simply upon allegations of a trade union's constitution being violated, without more, it is not the function of the Board to intervene (again see *A. J. Roberts*, [1974] OLRB Rep. March 169; and for the supervisory authority of the Courts in such matters, see *Howard v. Parrinton* (1971), 3 O.R. 659). Where, however, a violation of a specific section of the *Labour Relations Act* is involved, different considerations arise.

19. Section 3, upon which the complainants rely, provides:

Every person is free to join a trade union of his own choice and to participate in its lawful activities.

In *Deborah Brown*, [1976] OLRB Rep. Feb. 4, the Board made it clear that section 3, as a declaration of rights (albeit an important one), cannot by itself create an offence under the Act. But what about section 70, in conjunction with section 3, as argued by the complainants? Section 70 reads:

No person, trade union or employers' organization shall seek by intimidation or coercion to compel any person to become or refrain from becoming or to continue to be or to cease to be a member of a trade union or of an employers' organization or to refrain from exercising any other rights under this Act or from performing any obligations under this Act.

These sections by their terms appear to affirm an individual's right to freely join a trade union of his choice, *and to participate in its lawful activities*, without interference by way of intimidation or coercion. The respondent, however, submits that the protection for "union activity" under the *Labour Relations Act* was never intended to apply other than against employers.

20. The Board has heard that argument before. In *International Brotherhood of Electrical Workers', Local 120*, [1967] OLRB Rep. Sept. 586, for example, the complainant argued that he had been intimidated and coerced by the trade union and compelled to refrain from becoming a member of the trade union because an officer of the union had threatened and physically prevented him from writing the union's entrance examinations. The Board stated, at paragraph 12:

The activity usually dealt with under section 52 [now 70] of the Act, is activity on the part of an employer who does not wish his employees to become union members. In addition section 52 is intended to protect an employee from pressure by one union which tends to prevent the employee from becoming a member of another union. However, while it is not usually necessary for a person to invoke section 52 of the Act because of the conduct of the union, as alleged in this case, it is the opinion of the Board that the wording of section 52 afforded the complainant the protection he is seeking. To give any other interpretation of section 52 of the Act would be to distort the literal meaning of the words used in this section.

21. In *Canadian Textile and Chemical Union*, [1971] OLRB Rep. Aug. 469, the Board had before it an allegation that the grievor had been wrongfully removed from the office of President of the respondent union. The respondent argued, by way of preliminary objection, that this was an internal union matter, and that the complainant ought to exhaust the internal union appeal procedures. While the Board found that it could entertain the complaint, the Board dismissed the complaint on the ground that the respondent did not act improperly. The Board did, however, make the following comments with respect to possible allegations alleging a violation of section 52 [now 70] of the Act, at page 471:

The respondents have not removed Mr. Cauchi from office in violation of the Labour Relations Act or for any activity protected by the Act. The complainant has failed to distinguish removal from office for acting contrary to the interests of the union from removal from office in violation of the Act. *Mr. Cauchi was not intimidated or coerced pursuant to section 52 of the Act* nor was he removed for any reason that would violate section 59(2) [now 80(2)], nor has his freedom to join a trade union of his own choice under section 3 been violated.

(emphasis added)

While the Board in that case expressly preserved the possibility of a theory of “deferral” to internal trade union machinery, it went to to place important restrictions on the “contract” basis of that theory. At page 471, the Board stated:

We are not prepared to accede to the “contract theory”, which indicates that members of a trade union may have contracted to exhaust their rights within the internal trade union machinery before resorting to this Board where the issue *prima facie* indicates a violation of public policy.

22. Finally, in *S. A. Greco*, [1976] OLRB Rep. June 323, the Board was called upon to examine a continuing personal battle being waged between one Frank Amis, Business Manager of the respondent Local Union, and the complainant, one of the Local’s members. The Board found that a meeting held with the complainant in Mr. Amis’ office “was designed by Amis and his colleagues to intimidate and terrorize Greco because of his opposition to Amis”. The Board at page 331 went on:

26. ... There was evidence adduced before the Board that on or about July 9, 1973 Amis physically assaulted Greco when the latter refused and urged others to refuse to sign a blank consent to check-off form. The Board has no difficulty in accepting Greco’s statement that this assault took place.

27. The Board also accepts Greco’s claim that on or about January 20, 1975 Amis demanded that he leave a union meeting because he had not paid a fine although Greco had never been advised that there was a fine or charge outstanding against him. Amis refused to proceed with the meeting until Greco left.

28. The respondent submitted that the latter two incidents were matters which should properly be dealt with through the internal, constitutional

procedures of the union and were not matters with which this Board should concern itself.

After quoting with approval the comments of the Board in *Canadian Chemical and Textile Workers Union, supra*, the Board noted:

In the present instance the evidence and the issues are concerned with allegations of breaches of the Labour Relations Act, matters which thus are specifically brought within the jurisdiction of the Board. It might well be, nevertheless, that if the incidents were isolated and the proper internal machinery were readily available, with appropriate remedies, that the Board would defer to the constitutional procedures. In the present case, however, we are not concerned with an isolated incident. We are dealing with matters which go together to form a pattern of conduct in an ongoing relationship between Amis and Greco.

The Board concluded that the conduct complained of fell squarely within the provisions of section 61 [now 70] of the act, and directed a remedy.

23. What is the central complaint before the Board in the present case? It is that certain officials of the respondent engaged in a pattern of intimidating and coercive conduct designed to frustrate the mechanisms for free and open elections under the respondent's own constitution. Such mechanisms represent the very cornerstone of a democratic institution. In light of the Board's past comments, can it now be said that such conduct, if proven to be true, does not fall within the language of sections 70 and 3 of the *Labour Relations Act*? The Board on a daily basis is engaged in granting and protecting the collective bargaining rights of organizations like (and including) the respondent. If the Board has the jurisdiction, can it be argued that the Board has no interest, from the point of view of public policy, in entertaining allegations as serious as the present? The answer must be in the negative.

24. The Board wishes to emphasize once again that it does not consider it to be its mandate or function to act as a "watchdog" over a trade union's constitution, or to monitor irregularities in internal trade union procedure. Ample recourse is available in that regard through other forums. The Board is, however, prepared to receive the evidence which the applicant seeks to adduce in support of its allegations under section 70 of the *Labour Relations Act* leading to and including the disputed election in June, in order to determine whether, in fact, the internally-provided process for free elections has been frustrated by a pattern of intimidatory and coercive conduct on the part of responsible trade union officials. It is that alleged pattern of intimidatory conduct which sets this case apart, and the circumstances in which these elections were conducted must be examined in that light. Meetings at the local union hall tend not to be models of parliamentary decorum, and the Board must take care, when all of the evidence has been heard, to distinguish the normal give-and-take of the union hall from the concept of "intimidation" and "coercion", as those words are used in section 70 of the *Labour Relations Act*. The allegations do, however, raise a *prima facie* case for the Board proceeding, and the respondent's motion under Rule 71 is denied.

25. The question of authority and responsibility for the various acts complained of is extremely complex in this case. All of them occurred, for example, while the complainant Frank Manoni was still the Business Manager of the respondent. On the other hand, the Board

has not failed to note that the appeal to the General Convention, affirming and defending the conduct of the election, was taken in the name of the respondent. In order to ensure that all of the relevant issues are properly before the Board in this matter, the Board hereby adds Nello Scipioni and Bernard Carrozzi as respondents to the complaint.

26. The matter is referred to the Registrar for continuation of hearing, in order to entertain the evidence and representations of the parties with respect to paragraphs 2, 3 and 5 of the statement of facts set out herein.

0900-81-M Carpenters' District Council of Toronto and Vicinity on Behalf of Locals 27, 666, 681, 1133, 1304, 1747, 1963, and 3227, and 3233, United Brotherhood of Carpenters and Joiners of America, Applicant, v. **George Ryder Construction Ltd.**, Respondent.

Construction Industry Grievance – Damages – Failure to hire union members – Whether union must identify and testify as to each member who incurred loss – Extent of proof required to establish loss – Respondent having duty to dispute facts

BEFORE: D. E. Franks, Vice-Chairman, and Board Members W. H. Wightman and M. J. Fenwick.

APPEARANCES: *David McKee and Torrance Ferrier for the applicant; G. Grossman, B. M. Foote and N. A. Keith for the respondent.*

DECISION OF THE BOARD; December 3, 1981

1. By a decision of this Board dated August 7, 1981 the Board found the respondent liable for a violation of the collective agreement between the respondent and the applicant council of trade unions. In making that decision the Board found as follows:

“2. At the hearing in this matter the respondent admitted a violation of the collective agreement as alleged in the grievance. The respondent, however, took issue with the remedy sought by the applicant. In this regard there was again substantial agreement between the applicant and respondent as to certain facts. Thus the respondent accepted that the applicant could demonstrate that there were three or more people on the union's out-of-work list at the time which the project in question was operating. The respondent, however, took the position that such evidence was not sufficient to establish the applicant's case. The respondent's position was that as an ordinary matter of proof of the applicant's entitlement to relief, it was necessary for the applicant to call a number of members of the trade union and through oral evidence establish that during the time in question the members were not working at all. We should note at this point that the respondent does not raise any

specific allegations concerning the out-of-work list kept by the trade union but simply contends that the kind of evidence required by him is necessary for the establishment of damages suffered by the applicant.

3. We reject the respondent's contention that such evidence is necessary for the applicant to prove its claim for damages. Indeed, the out-of-work list is what it says it is and, in the absence of specific allegations concerning that list, we see no reason why we should not take it as sufficient evidence that there were members of the applicant trade union out of work at the time in question.

4. For the foregoing reasons, it is clear that the respondent having admitted the violation of the collective agreement and sufficient evidence to establish the entitlement of the applicant to damages for the violation claimed in the grievance that this Board can find that the respondent has violated the collective agreement as set out in the grievance and, as a consequence, order the respondent to pay to the applicant on behalf of its members damages in the amount claimed under the grievance. Accordingly we so direct the respondent to pay."

After the Board's decision of August 7th the respondent, by letter, asked the applicant for the names of its members on whose behalf it was seeking damages in this matter.

2. At the second hearing in this matter, concerning quantum of damages, counsel for the applicant and the respondent agreed that there were 470 hours of work in question, but counsel for the respondent reiterated its position that the applicant union was obliged to name the members on whose behalf they were filing the present grievance. Further, the respondent's position was that such members should be obliged at the hearing on the quantum of the award to come forward and show that they have in fact suffered a loss and that they made efforts to mitigate that loss, (and thus, that any award for damages would be reduced by the amount, if any, which such members made in the course of their employment.)

3. In support of this contention counsel for the respondent relies upon Article 21.17 of the collective agreement which reads as follows:

"21.17 Monetary settlements of a grievance involving employee(s) shall be forwarded to the Local Union or District Council for distribution to the grievor(s)."

Counsel argues that such grievors must be identified. This in turn must be taken together with the statement of the law concerning damages, by the Supreme Court of Canada, in *Red Deer College v. Michaels et al.*, [1975] 57 D.L.R. (3d) 386:

"None of the three cases in this Court can be taken to settle the question of the burden of proof as it arises in a claim for damages for wrongful dismissal and as it relates to the question of mitigation. It is, of course, for a wronged plaintiff to prove his damages, and there is therefore a burden upon him to establish on a balance of probabilities what his loss is. The parameters of loss are governed by legal principle. The pri-

mary rule in breach of contract cases, that a wronged plaintiff is entitled to be put in as good a position as he would have been in if there had been proper performance by the defendant, is subject to the qualification that the defendant cannot be called upon to pay for avoidable losses which would result in an increase in the quantum of damages payable to the plaintiff. The reference in the case law to a “duty” to mitigate should be understood in this sense.

In short, a wronged plaintiff is entitled to recover damages for the losses he has suffered but the extent of those losses may depend on whether he has taken reasonable steps to avoid their unreasonable accumulation. In *Payzu, Ltd. v. Saunders*, [1979] 2 K.B. 581 at p. 589, Scrutton, L. J., explained the matter in this way:

Whether it be more correct to say that a plaintiff must minimize his damages, or to say that he can recover no more than he would have suffered if he had acted reasonably, because any further damages do not reasonably follow from the defendant’s breach, the result is the same.

In the ordinary course of litigation respecting wrongful dismissal, a plaintiff, in offering proof of damages, would lead evidence respecting the loss he claims to have suffered by reason of the dismissal. He may have obtained other employment at a lesser or greater remuneration than before and this fact would have a bearing on his damages. He may not have obtained other employment, and the question whether he has stood idly or unreasonably by, or has tried without success to obtain other employment would be part of the case on damages. If it is the defendant’s position that the plaintiff could reasonably have avoided some part of the loss claimed, it is for the defendant to carry the burden of that issue, subject to the defendant being content to allow the matter to be disposed of on the trial Judge’s assessment of the plaintiff’s evidence on avoidable consequences.”

Counsel in the present matter then argues that the onus continues to rest with the applicant to have the grievors come forward and give evidence that they are ready, willing and able to go to work at the time in question.

4. We cannot accept counsel’s interpretation of the application, the *Red Deer College* case, in the present case. The applicant and the respondent (as noted in paragraph 2 of the decision of August 7th in this matter) agreed that there were three or more members of the trade union on the out of work list. It is our view that in the absence of any evidence tendered by the respondent this ends the matter with respect to the applicant’s proof of damage sufficient to establish liability on the part of the respondent in the present case. That is, that by agreeing to there being such members on the out-of-work list, the respondent at the previous hearing agreed that the applicant had a *prima facie* case of damages. The proposition which the *Red Deer College* case stands for in these circumstances would be that once a plaintiff, (i.e. the applicant) establishes a *prima facie* case then, if the respondent objects to the amount in question is entitled to lead evidence to show that the amount claimed includes items which

could have been avoided. However, in the present case, the respondent made no such claims either in the first hearing or in the second hearing. The respondent, simply put, cannot agree to a *prima facie* case by the applicant for damages, and then require the applicant to strictly prove such damages. On the other hand, having made such an admission the respondent could have led evidence concerning specific members in the applicant's hiring hall.

5. It seems to us that the source of the confusion raised in the argument by the respondent lies precisely in the difference between this case and the cases such as the *Red Deer College* case which are cases for unjust dismissal. Of course, in a case of unjust dismissal one knows precisely as soon as it occurs that there has been an alleged agreement as the particular grievor's conduct in light of that knowledge has an obvious bearing on the quantum of damages and whether or not attempts have been made to mitigate those damages. The present case, however, involves a substantially different remedy. The substance of the present grievance is the breach of the collective agreement by the respondent by refusing to hire members of the applicant as required by the hiring provisions of the collective agreement. As such the applicant trade union may or may not know who would be assigned to such jobs and of course whether such members would accept in the circumstances may very well be a matter of speculation. No one knows about the breach of the collective agreement at the time in question.

6. The nature of the kind of remedy requested in the present case was discussed at length by the Court of Appeal in the case of *Re Blouin Drywall Contractors Ltd. and United Brotherhood of Carpenters and Joiners of America, Local 2486*, [1975] 57 D.L.R. (3d) 199. In that case, the Court of Appeal found that a Board of Arbitration had the jurisdiction to make a monetary award to a trade union on behalf of its members who would have benefitted from a union hiring hall type of provision in a collective agreement. In this regard, the Court of Appeal said:

"Having regard to the fact that this agreement confers benefits on union members, which includes the benefits of preference in hiring, benefits under the welfare and vacation pay trust funds, both of which agreements form a part of the collective agreement and presumably the persons and bodies therein referred to are to be bound by the grievance and arbitration procedures, I see no reason to limit the right to grieve as contended for. It makes good sense to me that the voice of the non-employee union member should be heard in relation to these benefits. Accordingly, in my view, the non-union member has the status to claim by way of grievance but under the provisions of the collective agreement the grievance may be carried by the union. Alternatively, the union as a party to the agreement may claim on behalf of its members the loss of these benefits and this quite independently of the member's right to grieve."

It would seem to us that that reasoning applies to Article 21.17 in the present case at it applied to the language referring to "parties" in the *Blouin Drywall* case.

7. The *Blouin Drywall* case was followed by the *McKenna Brothers Ltd. and Plumbers Union, Local 527* (1975), 10 L.A.C. (2d) 273 (Shime) With the following additional observations.

“It is also apparent that there is little, if anything, that the union could do in forcing its members upon the company when it refused to hire them in order that the union could mitigate the damages that might accrue to the company. Indeed, the hiring hall practices are in themselves factors which would tend to relieve the company from any damages which might accrue. The union is constantly attempting to find work for its members and had it succeeded during the relevant periods, there would obviously have been a no damage to the company. Unfortunately, the union was not successful during the periods in question and some of its members remained out of work.”

8. For the foregoing reasons, we are of the view that the applicant has established its entitlement to damages in the present case. If the respondent had any objections to the findings on which this was based, the respondent need not have agreed to certain facts and certainly the respondent could have called whatever evidence concerning these matters that it wanted to call. For whatever reason, the respondent chose not to call evidence.

9. For the foregoing reason, the Board directs that the respondent pay to the applicant on behalf of its unemployed members \$6,885.50.

DECISION OF BOARD MEMBER W. H. WIGHTMAN;

1. While I cannot disagree that a penalty should attach to the Respondent, I am disturbed that payment is not going to specific members who might be said to have been injured. Apart from the economic disutility of paying twice for work there may be an even more serious social disutility in not having payment go to individuals in whose hands the monies would be taxable income and who, were they in receipt of unemployment insurance benefits, would be required to reimburse the public purse for those benefits.

2. It seems to me if our decisions cannot overcome these issues within the framework of existing legislature, then the public policy implications should be reviewed in the appropriate forum.

2447-80-R United Cement Lime & Gypsum Workers International Union, Applicant, v. **Indusmin Limited**, Respondents, v. Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers, Local Union 304, Intervener.

Bargaining-Unit – Build-up – Dependent Contractor – Only six employees engaged on application date – Volume of operations fluctuating through year – Whether Board deferring vote to peak period – Board declining to review 30 day rule

BEFORE: George W. Adams, Chairman, and Board Members J. A. Ronson and B. L. Armstrong.

APPEARANCES: *J. Egner and E. Mattocks for the applicant; N. MacL. Rogers, Q.C., J.D. Douglas, Gaston Berubé, A. Morrison, and B.C. Rawley for the respondent; and J. McNamee for the intervener.*

DECISION OF THE BOARD: December 4, 1981

1. This is an application for certification. The Board finds the applicant to be a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act*.
2. The Board further finds, on the agreement of the parties, that a unit consisting of all owner-operators of tractor-trailers who are dependent contractors hauling materials from the respondent's Acton Quarry, Acton, Ontario, to job sites, save and except dispatcher, office staff and persons covered by subsisting collective agreements constitutes a unit appropriate for collective bargaining.
3. By decision dated March 4, 1981 the Board appointed a labour relations officer to inquire into the employment status of persons characterized by the respondent as being independent contractors, and to entertain evidence, where practicable, with respect to the issue of seasonality and to the issue of the intervener's bargaining rights.
4. The Board was advised at the hearing scheduled to consider the labour relations officer's report that the intervener was not pursuing a claim that it already represented the persons falling within the above-described unit. Before the labour relations officer, it was agreed by the parties that for the purposes of the Board's "thirty-thirty rule", a proper list of employees would include six persons, namely:

J. Bessey,
F. Canino,
D. Green,
S. Grivas,
M. Macaro,
J. Macaro.

It was further agreed that for the purposes of the Board's examination with respect to the employment status of the six persons, that the evidence of Mr. Don Green was to be representative of himself and the other five individuals.

5. Having regard to the evidence contained in the labour relations officer's report and the representations of the parties, we are satisfied that the six persons in issue clearly constitute dependent contractors within the meaning of section 1(1)(h) of the *Labour Relations Act* and are employees of the respondents for the purposes of the Act. In coming to this conclusion, we have been influenced by the following factors. One hundred percent of Mr. Green's remuneration comes from the respondent. While he owns his own truck, he is substantially under the control and supervision of the respondent with respect to reporting pay, routes followed and work assignments. Mr. Green's activities exhibit little business or entrepreneurial initiatives. The method of remuneration is straight forward and relatively fixed.

6. However, it is the respondent's position that the six are not a substantial and representative number of the workforce that would normally compose the proposed bargaining unit. The respondent, therefore, takes the position that a vote should not be held and that the vote should be deferred to a time when a representative group is employed in the quarry. It also submitted that it was necessary to examine all potential members of the proposed bargaining (unit approximately forty) in order to ascertain their employment status. In its decision appointing a labour relations officer, the Board commented on this position in writing:

3. The respondent also submits that, in any event, the Board ought to defer processing the application pending a build-up of the trailer-tractor owner-drivers affected by the application. The Board was advised that by June there will be approximately 70 such persons utilized on any particular day whereas now only 6 trailer-tractor owner-drives are being used. The utilization of the quarry in question is obviously subject to the seasonal nature of the construction industry and the Board indicated its view that it was this aspect of the industry that the respondent was drawing to the Board's attention and not a classic "build-up" as that term is understood in labour relations before the Board. A "build-up" cannot be dependent on factors beyond the employees control such as market conditions. See *Emil Front et al* (1957), 57 CLLC 18,057. With respect to the seasonality of work, the Board has taken cognizance of this phenomenon in the canning and tobacco industry in defining bargaining units. See *Melnor Manufacturing Ltd.*, [1979] OLRB Rep. Mar. 1288 and *Board of Education for the Borough of Scarborough et al*, Board File No. 2003-79-R, December 11, 1980. In the construction industry the Board is specifically freed of these considerations. See Section 108(2).

7. Counsel for the applicant objected to the procedure proposed by the respondent. Counsel submitted that the Board should confine its decision to the six employees properly on the list in that the proposed procedure was fraught with delay and the respondent had not made out a prima facie case for the inclusion of the seasonal operators.

8. The respondent called Mr. Alex Morrison, General Manager of its Aggregates Division to give evidence on the "seasonality/buildup" issue. The respondent sells and ships crushed limestone in the Toronto area and virtually all purchasers are connected with the construction industry including road contractors, concrete operators, precast, ready mix,

brick and block manufacturers and asphalt producers. The respondent uses various types of trucks including tandems and trailers. Trailers are larger vehicles and generally the rate structure is cheaper than the smaller tandems. Morrison said the sources of most of these vehicles are through broker operations and fleet operators. But, apart from these two sources, there are individual owner-operators that the respondent uses and engages directly.

9. Morrison stated that the respondent does very little business in the first three or four months of the year but from June to the end of November business is "pretty well [on a] plateau". A chart was prepared for the Board's use breaking out the respondent trailer business for 1979 and 1980. It is based on the tonnage of shipments for those years as a percentage by month. The chart shows low activity for January, February, March and April; pronounced activity for May and June; a much lower level of activity July to October; increased activity in November; and a falling off of activity in December. Morrison estimated that fifteen vehicles were utilized in the low activity months and about forty in the heavier activity months. This seasonality reflects the construction industry and weather conditions.

10. Morrison thought that trucks obtained through a broker could spend up to fifty percent of a work week at the Acton quarry and that some of the individual operators could spend up to eighty percent of their time servicing Indusmin. Morrison produced a list of trucks for June 15, 1981. It included twenty-three owner operators any of whom might have been referred through a broker or contracted on an individual basis. Another twenty-three were owned by fleet operators employing drivers.

11. On cross-examination, Morrison agreed that the chart depicted seasonal fluctuations over which the respondent had no control. He estimated that fifteen to twenty percent of the quarry tonnage was picked up by owner-operators engaged directly by the respondent and that the six operators subject to the applicant would handle approximately ten percent of the quarry's tonnage or one-half to two-thirds of the individual operators tonnage.

12. Against this evidence, the applicant takes the position that the tractor-trailers driven by employees of fleet operators and the owner-operators connected with any brokers are unaffected by this application. The Board was referred to *Indusmin Limited*, [1977] OLRB Rep. Sept. 552 and *Adbo Contracting Company Ltd.*, [1977] OLRB Rep. April 197 as authority for the latter contention. The applicant therefore sought to be certified for all owner-operators engaged by the respondent directly. In the alternative, the applicant requested the Board to certify it for the six owner-operators engaged at the time of the application, in effect treating all other owner-operators directly engaged by the respondent as seasonal employees. Counsel for the respondent contended that, having regard to the Board's decision in *A. Cupido Haulage Limited*, [1980] OLRB Rep. May 679, it was by no means clear that the owner-operators obtained by the respondent through brokers were not employees of the respondent if they obtained a substantial portion of their income from the Acton quarry. And if they proved to be employees of the respondent along with other owner-operators engaged by the respondent directly during the more active period of the year, the respondent submitted that the six owner-operators currently on the lists submitted in this application would not constitute a "substantial and representative number of employees at work on the date of application". See *Peter Austin Manufacturing Co.*, [1967] OLRB Rep. May 144. On this basis, the respondent requests that a vote be directed when such a substantial and representative number of employees was engaged as in *Dufferin Aggregates*, [1978] OLRB Rep. Mar. 278. The respondent further submitted that the Board should reconsider the application of its "30

day rule” in the facts before it as was argued in *Dufferin Aggregates, supra*, and *Sherman Sand and Gravel Ltd.*, [1978] OLRB Rep. May 460.

13. Having reviewed the thoughtful submissions of counsel and the facts as established before us, we do not think this is a case justifying a review of the “30 day rule” or the treatment of certain owner-operators as seasonal employees. We are also of the view that the direction of a representation vote at some time in the future is not appropriate. The applicant takes the position that it is not seeking to represent owner-operators engaged by the respondent through brokers and the respondent itself does not take the position that such owner-operators are its employees for the purposes of the *Labour Relations Act*. It merely indicates that the situation it finds itself in is unclear. Given the consequences of delay to those now interested in collective bargaining, the matters raised by the respondent are too speculative to warrant a deferral of this application. On the other hand, based on Mr. Morrison’s evidence, it would appear from his tonnage “guesstimates” that the owner-operators engaged by the respondent at the time of this application account for over fifty percent of the tonnage handled by all owner-operators engaged by the respondent directly. On that evidence, we are satisfied that the six persons constitute a substantial and representative number of employees assuming, but not deciding, that the owner-operators engaged directly by the respondent at other times are dependent contractors or conventional employees. Any doubts that we may have in this regard are outweighed by the Board’s reluctance to characterize an industry as seasonal. Indeed, the Board has specifically refrained from so treating the construction industry and the respondent’s activities are functionally related to that industry.

14. The Board is satisfied on the basis of all the evidence before it that more than fifty-five percent of the employees of the respondent in the bargaining unit at the time the application was made, were members of the applicant on February 20, 1981, the terminal date fixed for this application and the date the Board determines, under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

15. A certificate will issue to the applicant.

0540-81-M Labourers' International Union of North America,
Ontario Provincial District Council, Applicant, v. **The Jackson-Lewis
Company Limited**, Respondent

Collective Agreement – Construction Industry Grievance – Employee – Practice and Procedure – Whether horticulture may form part of “construction industry” – Whether horticulture lawful subject for collective bargaining – Whether collective agreement lawfully regulating horticultural work – Board explaining restricted nature of horticultural exclusion in Act – Whether Board powers restricted to interpreting agreement when acting as arbitrator

BEFORE: N. B. Satterfield, Vice-Chairman and Board Members J. Wilson and H. Kobryn.

APPEARANCES: *A. M. Minsky, T. Connolly and F. Spera for the applicant; B. W. Binning for the respondent; James B. Noonan, Glen Peister and Barry Ryan for McLean-Peister Ltd.*

DECISION OF THE BOARD; December 14, 1981

1. The applicant has referred a grievance concerning the interpretation, application, administration or alleged violation of a collective agreement to the Board for final and binding arbitration pursuant to section 124 of the *Labour Relations Act*.

• • •

3. The grievance alleges that the respondent has violated clause 2.05 of the provincial collective agreement (“the agreement”) between the labourers designated employer bargaining agency and the labourers designated employee bargaining agency. The agreement is a provincial agreement within the meaning of clause (e) of section 137 of the Act. Clause 2.05, which is contained in Article 2 — Union Security, Work Jurisdiction, Assignment of Work, Subcontracting of the agreement, states as follows:

“The Employer agrees to engage only subcontractors who are in contractual relations with the Union and/or its affiliated bargaining agents for all work covered by this Agreement, or work forming part of an I.C.I. General Contract, except the work described in Schedule “D” hereof.”.

Schedule “D” to the master portion of the agreement lists the following exceptions to clause 2.05:

- “(1) Province-wide: all waterproofing and cement finishing work.
- (2) Local 1081’s area:
 - (a) landscaping
 - (b) site service, only when forming part of the mechanical contract
 - (c) when a general contractor not bound by this Agreement is tendering on the work, the following additional work is also excepted:
 - (i) roads, asphalt, curbs and sidewalks;
 - (ii) excavation, backfilling and compaction.

4. The violation is alleged to have occurred when the respondent subcontracted certain landscaping work (more fully described hereunder in the "Agreed Statement of Facts and Point in Issue") to McLean-Peister Ltd., an employer which is not in a collective bargaining relationship with the applicant or any of its constituent local unions. McLean-Peister Ltd. has filed an intervention in this matter, to which reference is made in paragraph 7 of the Agreed Statement of Facts and Point in Issue ("the agreed statement"). The style of cause and text of the agreed statement is set out below in full. It has been signed on behalf of the applicant, respondent and McLean-Peister Ltd., by their respective counsel Mr. A. M. Minsky for the applicant; Mr. B. W. Binning for the respondent and Mr. J. B. Noonan for McLean-Peister Ltd.:

O.L.R.B. File No: 0540-81-M

BEFORE THE ONTARIO LABOUR RELATIONS BOARD

BETWEEN:

Labourers' International Union of North America,
Ontario Provincial District Council

Applicant,

- and -

The Jackson-Lewis Company Limited

Respondent

AGREED STATEMENT OF FACTS AND POINT IN ISSUE

For the purpose of this Referral, the parties agree with one another on the following facts and agree to submit to the Board for determination the following point of law in dispute between them:

1. The applicant and respondent are bound by the Provincial Agreement between the Labourers' Employer Bargaining Agency and Labourers' Employee Bargaining Agency dated June 26th, 1980 ("the Provincial Agreement"), which is marked hereto as Exhibit 1 in these proceedings;

2. By grievance dated June 2nd, 1981, the applicant grieved that the respondent had unlawfully subcontracted the landscaping and the necessary and related work thereto, including formwork and concrete work at the C.I.L. House Project (commercial office building), 90 Sheppard Avenue East, Willowdale, Ontario ("the Project") to McLean-Peister Ltd. who is not in contractual relations with the Council and/or its affiliated bargaining agents, contrary to the Provincial Agreement and, in particular, Article 2.05 thereof. The said grievance is marked as Exhibit 2 in these proceedings;

3. The primary business of the employers bound by the Provincial Agreement including the respondent herein, is neither agricultural nor horticultural work and in any event, they do not normally employ persons in such work;

4. The following additional facts are agreed to by the parties but the applicant specifically denies the relevance of same:-

- (a) McLean-Peister Limited is an employer whose primary business is horticulture;
- (b) A large majority of contractors performing horticulture work on ICI sites in Board Area 8 are employers whose primary business is horticulture;
- (c) A minority of these employers are each bound by a collective agreement with the Labourers' Union covering such work;
- (d) Of the contractors performing such work whose business is not primarily horticulture, a minority are each bound by a collective agreement with the Labourers' Union covering such work.

5. The parties request that the Board answer and determine the following point of law in dispute between them, namely:

"Whether the inclusion and coverage of horticulture (landscaping) work in the Provincial Agreement such as is being performed by McLean-Peister Ltd. at the Project, was a lawful subject for bargaining by the designated bargaining agencies, including whether the subcontracting of such horticulture (landscaping) work may be lawfully regulated by the subcontracting provision of the said Provincial Agreement, namely Article 2.05 thereof."

6. The respondent irrevocably waives and withdraws all other defences or objections which it may have to the grievance herein;

7. It is understood and agreed that McLean-Peister Ltd. may make representations only with respect to the determination of the above mentioned point of law in issue without concession or admission by the applicant of McLean-Peister Ltd.'s status as Intervener in these proceedings or in any other future proceedings between the parties herein.

5. The agreed statement was filed with the Board at the hearing scheduled for this application and all counsel made their submissions thereon to the Board. Those submissions, together with the agreed statement raise the following issues, the first two of which are preliminary in nature:

- (a) whether the work in question is work captured by the definition of the construction industry in section 1(1)(f) of the Act;
- (b) whether the scope of the Board's jurisdiction to determine the "point in issue" of the agreed statement is limited to the authority of an arbitrator under the agreement so that it cannot resolve the issue

by reference to the *Labour Relations Act*; or in other words whether the Board, when it is determining a referral under section 124 of the Act, has only the powers of an arbitrator or has all of its usual powers under the Act; and

- (c) whether horticulture work is a lawful subject for collective bargaining by the designated labourers employee and employer bargaining agencies and whether horticulture work may be regulated lawfully by the subcontracting provision of the agreement, namely clause 2.05 thereof.

6. It is clear from the submissions that counsel do not wish the Board to interpret clause 2.05, determine whether the work in question is work within the industrial, commercial and institutional sector of the construction industry or determine whether McLean-Peister Ltd., has status as a party to the application. It is unnecessary, in any event, for the Board to determine that status of McLean-Peister Ltd., because its status for purposes of the agreed statement and the issues flowing therefrom is the same as the applicant and respondent by the very terms of the agreed statement.

7. Having reviewed and considered fully the submissions of counsel, the Board's determination of the issues are set out below.

8. The issue whether the horticulture work in question is the kind of work contained in the definition of the construction industry in section 1(1)(f) of the Act was raised by Mr. Noonan who argued that, if the Board viewed together sections 1(1)(f) and 2(c), it should conclude that section 1(1)(f) does not include horticulture work and that the legislature did not intend it to be included. He argued further that, were the Board to reach that conclusion, it would have no jurisdiction under section 124 to hear the grievance.

9. Section 2(c) excludes from the application of the Act

“...a person, other than an employee of a municipality or a person employed in silvaculture, who is employed in horticulture *by an employer whose primary business is agriculture or horticulture*,”

(emphasis added)

Section 1(1)(f) defines the “construction industry” to mean

“...the businesses that are engaged in constructing, altering, decorating, repairing or demolishing buildings, structures, roads, sewers, water or gas mains, pipe lines, tunnels, bridges, canals or other works at the site thereof;”

It is clear from a plain reading of section 2(c) that the Act excludes persons who are “...employed in horticulture *by an employer whose primary business is agriculture or horticulture*,” (emphasis added). The corollary of that exclusion is the conclusion that the Act does not exclude employees who are employed in horticulture work by an employer whose primary business is not agriculture or horticulture. By the same reasoning it can be said that

the Act does not exclude horticulture *per se*. Therefore section 2(c) of the Act does not operate to exclude either horticulture work or all persons engaged in that work from the application of the Act, or in particular from the application of the “construction industry” definition in section 1(1)(f) of the Act.

10. Since section 2(c) of the Act does not operate to exclude horticulture *per se* from the definition of the “construction industry”, the remaining question in this preliminary issue is whether the specific work in question falls within that definition. That work in question falls within that definition. That work is described in paragraph 2 of the agreed statement as “...the landscaping and the necessary and related work thereto, including formwork and concrete work at the C.I.L. House Project (commercial office building),...”. Counsel are agreed that the landscaping work on the project is horticulture (see the definition of the point in issue in paragraph 5 of the agreed statement). In addition to the landscaping and horticulture references in the agreed statement, it is uncontradicted that the respondent operates a business in the construction industry and its general contract for the C.I.L. House Project includes the landscaping work in question which is to be performed at that site.

11. There is nothing in the wording of either section 1(1)(f) or section 2(c) to suggest that the terms “construction” and “horticulture” are mutually exclusive and the Board finds support for this observation from the comments at page 293 of the Board’s decision in *McLean-Peister Ltd.*, [1962] OLRB Rep. Nov. 290. The Board found in that case that McLean-Peister Ltd. was an employer whose primary business was agriculture or horticulture and consequently dismissed an application for certification from a constituent local of the applicant.

Combining these [dictionary] definitions of cultivation and garden, horticulture may thus be defined as ‘The art or practice of cultivating or tilling and preparing a piece of ground appropriated to the cultivation of herbs (including grass), plants, flowers or vegetables’.

Having regard to the operations of the respondent and to the work performed by the employees on the project involved in this application, all as outlined above, we are of the opinion that the primary business of the respondent falls within this definition, as does the employment of the employees in question. We are unable to agree that the fact that the major portion of the respondent’s operation is now in commercial, industrial and institutional landscaping as opposed to residential work or nursery work can alter the fact that the respondent is engaged in cultivation or tilling and preparing a piece of ground appropriate to the cultivation of herbs (which includes grass), flowers and plants. *Nor can we accept the argument that because the work (or part of it) may fall within the definition of ‘construction industry’ as defined in section 1(1)(da) [now section 1(1)(f)] of The Labour Relations Act, this takes it out of horticulture. It appears to us that some work on construction sites may very well be horticultural by nature. But what is important is what is being done, not where it is done.*

(emphasis added)

While the words of section 1(1)(f) "...engaged in constructing, [or] altering, ... buildings, structures, ... or other works at the site thereof;" are broad enough to encompass the landscaping work, in the absence of evidence such as the specific nature of the work and the tools and equipment used, the Board is of the view it should not rely on the "basket" phrase "... or other works at the site thereof;" to make such a finding. This case, however, lacks both the type of evidence just referred to and any cogent evidence that the work in question is *not* construction work. In these circumstances, the fact that the respondent:

- (a) operates a business in the construction industry;
- (b) has entered into a contract making it responsible for the performance of work which falls squarely within the section 1(1)(f) definition of construction industry; and
- (c) that work includes landscaping the construction site property,

persuades the Board to conclude that the landscaping work at issue here is work which falls within the definition of construction industry. Where landscaping work is so clearly part and parcel of new construction, as it is here, any other conclusion would seem absurd.

12. In view of the foregoing conclusion, the Board finds that the landscaping work at issue here is work which falls within the definition of construction industry. The Board, therefore, has jurisdiction under section 124 to determine the matters placed in issue before it.

13. The applicant raised the second of the three issues. Mr. Minsky argued for the applicant that, when the Board is sitting as an arbitrator under section 124 of the Act, it has only the powers of an arbitrator, those powers being obtained from the collective agreement. He contends, therefore, that the Board cannot refer to the *Labour Relations Act* to determine the point in issue, but is limited to construing the agreement for that purpose. The Board finds it unusual, to say the least, that a party which has asked the Board to decide whether it is lawful to bargain about a particular subject matter takes the position that the Board cannot refer, when deciding the question of lawfulness, to the very statute from which the parties themselves derive their rights and duties with respect to collective bargaining. Nonetheless, the Board is disposed to answer in the following terms the question of what is the scope of its powers when the Board sits as an arbitrator under section 124.

14. The Board obviously has not taken the narrow view of its powers that counsel has, but the Board has relied on its general powers to apply other provisions of the Act, such as section 1(4) or section 72, when determining applications under section 124. In *J. G. Rivard Limited*, [1980] OLRB Rep. July 1009, the Board, having found that it did not have jurisdiction under section 124 to determine the particular issue referred to it for final and binding arbitration, relied on other sections of the Act to find that the applicant could pursue its claim under section 89 of the Act. Support for this exercise of the Board's powers is found in decisions of the Ontario court. While it was prior to the enactment of section 124 of the Act, the High Court in *Regina v. Ontario Labour Relations Board ex parte Genaire Ltd.*, [1958] O.R. 637, instructed the Board to "...exercise any jurisdiction given to it under the Act, notwithstanding that a particular section of the Act is referred to in the formal application". More recently, in *International Association of Heat & Frost Insulators & Asbestos Workers Local 95 v. Master Insulators Association of Ontario, Incorporated* (1980), 25 O.R. (2d) 8, the

Divisional Court held that the Board's proceedings under section 124 are exempted from the provisions of *The Statutory Powers Procedures Act* and in so doing stated, in part, that:

"... In my view, the Board, in fulfilling its duties under section 112a [now section 124] sits as an arbitrator and gives its decision as an arbitrator, *although in doing so the number of persons sitting and the procedure respecting majority decisions and minority decisions, for example, will be governed by the statutory provisions governing the Board's conduct of its affairs and the Board's normal practice.*"

[emphasis added]

This clear reference of the court to the Board's powers under section 102 suggests that the Board, even when sitting as an arbitrator will be governed by other relative provisions of the Act and that the Board's powers such as those under section 103 and section 106 are not removed from it when it is proceeding under section 124. Again in *The Ontario Erectors Association and Sheaffer-Townsend Limited v. International Union of Operating Engineers, Local 793* (1980), 2 A.C. W.S. (2d) 307, the Divisional Court, in finding that the Board had proceeded correctly when it declined to use extrinsic evidence which was before it to construe collective agreement language which it found to be unambiguous, stated:

"We believe the Board was right in taking this approach. Normally, the Ontario Labour Relations Board is largely protected from judicial review by section 97 [now section 108] of the Act which effectively limits review to matters of strict jurisdiction or breaches of natural justice. It is submitted by the applicant that section 97 [now section 108], known popularly as the privative clause, does not apply to the Board *qua* Arbitrators. The short answer to that submission, and the only one it is necessary for us to examine, is that section 97 [now section 108] on its face protects any decision, order, direction, declaration or ruling made by the Board. Had the Legislature intended a decision made by the Board *qua* Arbitrators to be excepted, it could easily have said so and it did not. Our powers of correction therefore are limited to errors of jurisdiction and we find none...."

15. Even if the Board's powers were limited to those of an arbitrator under the agreement, as counsel argues, the Board would still be able to decide the point in issue in this case by reference, if needed, to the *Labour Relations Act*. In the Board's view, clause 15.01 of the agreement which is set out below provides an arbitrator with the authority to construe any federal or provincial legislation in order to determine whether a provision of the agreement is lawful. To construe legislation for this purpose is to construe the agreement.

15.01 In the event that any of the provisions of this Agreement are found to be in conflict with any valid and applicable Federal or Provincial law now existing or hereinafter enacted, it is agreed that such law shall supersede the conflicting provision without in any way affecting the remainder of the Agreement.

16. The final issue before the Board is the two-fold question posed by the point in issue in paragraph 5 of the agreed statement; that is:

- (a) “Whether the inclusion and coverage of horticulture (landscaping) work in the Provincial Agreement such as is being performed by McLean-Peister Ltd. at the Project, was a lawful subject for bargaining by the designated bargaining agencies, [and]
- (b) ... whether the subcontracting of such horticulture (landscaping) work may be lawfully regulated by the subcontracting provision of the said Provincial Agreement, namely Article 2.05 thereof”.

The Board attaches no significance to the reference in that question to “... horticulture (landscaping) work as is being performed by McLean-Peister...” other than as a way to describe the work which the parties wish the Board to deal with.

17. Section 2(c) of the Act, in the process of removing from the application of the Act those employees of employers whose primary business is agriculture or horticulture, distinguishes specifically those employers from the employers whose primary business is *not* agriculture or horticulture. The primary business of McLean-Peister Ltd. and the contractors included in item 4(b) of the agreed statement is horticulture and the Act does not apply to their employees. Thus their employees have none of the rights given by the Act such as the right to organize and bargain collectively for their terms and conditions of employment. The primary business of the respondent and the other employers bound by the agreement, on the other hand, is *not* agriculture or horticulture and their employees have all of the rights given by the Act, including the right to organize and bargain collectively. Consequently, while McLean-Peister Ltd. is doing the work in issue, the Act does not apply to its employees and were the other contractors like McLean-Peister Ltd. doing the work, the same situation would pertain to their employees. On the other hand, were the respondent or the other employers bound by the agreement to do the work, their employees would be covered by the Act. Since, as the Board found earlier in this decision, section 2(c) neither excludes horticulture work, *per se*, nor *all* employees engaged in that work, it seems to the Board that there is no reason why the two designated bargaining agencies could not bargain over horticulture work.

18. With respect to the question of whether the two bargaining agencies may lawfully regulate the subcontracting of horticulture work, Mr. Noonan argues that an affirmative answer to that question would foreclose McLean-Peister Ltd., as well as the other subcontractors included in item (b) of the paragraph 4 of the agreed statement from obtaining landscaping work for which the applicant claims jurisdiction under the agreement. In the alternative, Mr. Noonan argues, McLean-Peister Ltd., and employers like it, would be forced to sign an agreement with the applicant in order to obtain the landscaping work in question here, an agreement which would not be a collective agreement within the meaning of section 1(1)(e) of the Act and therefore not enforceable under the Act. It would appear from item (c) of paragraph 4 of the agreed statement that a few have already taken this step. Those agreements may not afford the parties any rights under the Act but they do allow those employers to obtain work while protecting at the same time the applicant's claimed work jurisdiction. If these agreements have no status under the Act insofar as they apply to employers engaged in agriculture or horticulture and their employees, that results from section 2(c) of the Act and not from any design of the parties. See *Board of Education for the City of Windsor v. Ontario School Teachers' Federation*, 7 O.R. (2d) 26 for an example of how the courts have viewed such agreements.

19. While it might well be the case that employers like McLean-Peister Ltd., have to sign such an agreement in order to compete for this kind of business, it does not follow automatically that the clause producing that result, in this case clause 2.05 of the agreement, is unlawful. The Board previously has dealt with challenges to the validity of sub-contracting clauses because of restrictions which they place on third parties. The Board has consistently found the legitimate aims of such clauses to override the interests of third parties whose commerce may be restricted by them. In *Metropolitan Toronto Apartment Builders Association*, [1978] OLRB Rep. Nov. 1022, (application for judicial review dismissed by Divisional Court at 24 O.R. (2d) 349), the Board, observing that a sub-contracting clause is generally designed to protect the work jurisdiction of a union, commented as follows at page 1033:

“These decisions [of the B.C. Labour Relations Board] appear to recognize that the primary purpose of the sub-contracting clause is to protect the work jurisdiction of the union which has obtained such a clause, a purpose not in conflict with any collective bargaining legislation.”

20. The Board more recently considered the legality of a sub-contracting clause in *International Union of Operating Engineers, Local 743*, [1981] OLRB Rep. June 692. The sub-contracting provision of the collective agreement in that case prohibited the employer from sub-contracting work to owner-operators who did not sign an agreement with the union. The Board found at paragraph 31 that an agreement between an owner-operator and the union could not be a collective agreement under the Act, but was “. . . simply a device by which the union administers its contractual rights or discretion flowing from negotiated sub-contracting clauses.”. The Board went on to hold, at paragraph 40, that the clause did not violate any provision of the *Labour Relations Act*.

21. Thus the Board has found that the regulations of sub-contracting of work for the protection of a union's claimed work jurisdiction is not unlawful *per se*. Since horticulture work is not excluded from the Act it seems to the Board that it would not be unlawful for a union to protect a claimed jurisdiction over that work by means of a sub-contracting provision. Therefore there is no compelling reason to deny the applicant in this case the opportunity to seek to protect its claimed work jurisdiction simply because section 2(c) of the Act excludes from its application employees of employers whose primary business is agriculture or horticulture.

22. The parties have asked the Board only to determine the point in issue and not the merits of the grievance. Accordingly the Board determines that horticulture (landscaping) work such as is being performed by McLean-Peister Ltd., at the C.I.L. House Project is a lawful subject for bargaining by the labourers designated bargaining agencies and the sub-contracting of such horticulture (landscaping) work may be lawfully regulated by the sub-contracting provision, clause 2.05, of the agreement.

1456-81-R John Biggins and a group of employees Applicants, v. International Union, United Automobile, Aerospace, and Agricultural Implement Workers of America (U.A.W.) Local 673, Respondent

Termination – Parties adopting unique procedure to determine inclusion or exclusion of employees in new classifications in unit – Each employee given chance to opt in or out of unit – Whether those who opted out having standing to apply for termination under section 60 – Whether in section 60 termination application union must show entitlement to represent total unit or voluntarily recognized accretion only

BEFORE: R.O. McDowell, Vice-Chairman, and Board Members O. Hodges and F. W. Murray.

APPEARANCES: *David Rubin, Doug Christie, John Biggins, Robert Harvey, Helmut Schwarze, William J. Taylor, Hugh McBryde, David N. Pim and James Greig for the applicants; M. Kenny, C. Aitken, J. O'Neil for the respondent; no one appearing for the De Havilland Aircraft of Canada Limited.*

DECISION OF THE BOARD; December 31, 1981

I

1. This is an application for termination of bargaining rights filed under section 60 of the *Labour Relations Act*. For ease of reference the respondent will be referred to as “the union”, and the applicants’ employer, De Havilland Aircraft of Canada Limited, will be referred to as “De Havilland” or “the company”.

2. In 1954 the union was certified to represent a bargaining unit of De Havilland’s “office and clerical” employees. The bargaining unit was described as follows (emphasis added):

all office and clerical employees of De Havilland Aircraft of Canada Limited in its main plant and engine division, Toronto, save and except section heads, persons above the rank of section head, one secretary to each department manager or to a person of higher status, draughtsmen in any department, and persons of higher status than draughtsmen in the engineering departments, registered nurses, buyers, *senior cost estimators, technical writers and illustrators*, field service representatives, subcontract placement officers, liaison officers, *teletype operator*, the executive chauffeur, clerks assigned to the confidential payroll composed of persons not employed within the scope of any bargaining unit, and all employees engaged in the industrial relations department including personnel engaged in plant security and protection.

This unit description follows a standard format used by the Board for many years. The certificate refers to a generic group (“all office and clerical employees”) with specific exclusions based upon managerial status or community of interest considerations. The unit comprises all *existing* office and clerical classifications not specifically excluded, as well as

any *new* office and clerical classifications which might be created in the future. Neither the union's status as bargaining agent, nor the scope of its bargaining rights, depends upon the continued employment of the individuals employed at the time of certification, or the continuation of precisely the same jobs or job descriptions. A subsequent enlargement, contraction, or alteration of the bargaining unit does not affect the union's right to represent all office and clerical classifications other than those specifically excluded.

3. For some years this bargaining unit description was reproduced verbatim in the various collective agreements which the union and De Havilland negotiated from time to time. But De Havilland was an expanding high technology enterprise. Technological change and organizational innovation altered the duties and responsibilities of employees in existing classifications, and required the creation of many new ones. By the late 1960's, the union and De Havilland concluded that technology and the market-place were making the bargaining unit definition in the 1954 certificate increasingly obsolete. In 1969, they negotiated the following clause to replace it:

ARTICLE II — Scope & Recognition

2.01 The Company and the Union agree with the principle in defining the Bargaining Unit that Clauses 2.02 and 2.03 identifies the jobs that are excluded from the Bargaining Unit and that in future all new office jobs will be included in the Bargaining Unit unless the parties agree to exclude them because the duties and responsibilities of the new job are comparable to those of jobs now excluded. Any dispute of this nature between the parties will be resolved in accordance with Clause 2.04 and 2.05.

2.02 The Company recognizes the Union as the sole and exclusive bargaining agent for all office and clerical employees of the Company in the offices at any of its facilities located within a fifty (50) mile radius of Downsview. The Bargaining Unit does not include persons employed by the Company in a managerial capacity, persons employed in the Personnel and industrial Relations Department, section heads or supervisory, management or professional personnel above the rank of section head; Security and protection personnel; Field Service Representatives; Industrial Engineers, Engineering Technicians, Liaison Engineers, Engineering Loftsmen; draftsmen and one secretary to each department manager or persons of a higher status.

2.03 The following classifications and employees assigned to these classifications are also excluded from the Bargaining Unit:—

Finance

1. Budget & Forecasts Analyst*
2. Budget & Forecasts Typist*
3. Cashier
4. Teletype Operator
5. E.D.P. Programmers
6. E.D.P. Systems Analyst

Marketing & Product Support

1. Overhaul Coordinator*
2. Warranty Coordinator*
3. Confidential file Clerk (1 only)*

Operations

1. Senior cost Estimator
2. Budget Analyst*
3. Forecast & Performance Analyst*
4. Buyer
5. Sub-Contract Placement Officer
6. Executive Chauffeurs

Contracts

1. Contract Administrator

2.04 Before the Company decides to exclude from the Bargaining Unit any newly created job other than covered in 2.02 above it will discuss the new position with the Bargaining Committee and allow the Union to investigate the work performed in the new job. In the event of a dispute concerning the exclusion of the new job, a mutually selected adjudicator will decide whether to include the new position in the Bargaining Unit or whether it is to be added to the lists of exclusions under 2.03 above. Before the dispute goes to the adjudicator, the Company will supply the Union with a written outline of the job and allow the Union to investigate the work performed in the new job.

The Union and the Company will each present their positions and argument in writing to the adjudicator with copies to the other party. The adjudicator in resolving the dispute shall compare the duties and responsibilities of the new position to those of existing classifications included in the Bargaining Unit and those classifications which the parties have agreed to exclude from the Bargaining Unit.

This procedure is not to be considered as part of the normal grievance procedure. The parties however agree that the decision of the adjudicator under this Article will be final and binding upon each party.

2.05 In the event the Company decides to increase the number of employees classified under those positions designated by an asterik in 2.03 above, the duties of the additionally assigned employees will be reviewed with the Bargaining Committee to determine whether they are to be excluded under the title of that classification or whether it is necessary to create a new job under 2.04 above. The agreed list will be supplied to the Union and kept up to date at all times.

Any dispute under this paragraph may be referred to the adjudicator
for a decision in accordance with 2.04.

4. This new definition (now, of course, eleven years old) envisages a unit which expands with the exigencies of an evolving business situation; but, unlike its predecessor, it makes it clear that accretions or new classifications will *not* fall automatically into the unit, but will be the subject of a complex process of discussion and adjudication. Moreover, Article 2.05 recognizes that a job title, in itself, does not define any particular set of job functions, nor is the assignment of a label of job title determinative of an individual's status. On the other hand, in a fluid situation when the duties of employees are changing, it might be a difficult task to distinguish between a redefinition of job functions in an excluded classification, and the creation of a new classification which might be included pursuant to Article 2.04.

5. The new recognition clause preserved some of the named exclusions from the 1954 certificate, but not all of them. The reference to "technical writers" and "illustrators" was dropped — implying, *prima facie*, that these classifications should now be included in the bargaining unit. As it turned out, this was not the position which the company took. Despite the alteration of the scope clause, the company did not apply the agreement to the groups no longer excluded. Many of the applicants in the instant proceedings are employed in these classifications.

6. The new recognition clause did not resolve the differences between the parties, nor did the negotiated adjudication process provide an effective mechanism for settling them. There continued to be a series of demarcation problems concerning the scope and limits of the union's bargaining rights. In the union's view, the company was using the specifically excluded classifications as "umbrellas" to shelter non-bargaining unit personnel involved in work overlapping with, or similar to, that of employees in the bargaining unit, — while from time to time, bargaining unit employees were being laid off for lack of work. The classification "engineering technician", for example, began to appear as a "catchall" for a number of jobs similar to, but excluded from, the bargaining unit. "Junior Cost Estimators" sat side by side and exchanged work with "Senior Cost Estimators". Although there was no significant difference in the character of their work, the former were included in the bargaining unit and the latter were excluded. Eventually, there were thirteen Senior Cost Estimators (excluded) and three Junior Cost Estimators (included) all doing essentially the same work. Similarly, the "data collective clerk" performed similar functions to the "data collection co-ordinator"; but the latter position was considered by the company to be beyond the scope of the collective agreement.

7. The trade union characterized the situation as "a cat and mouse game", with the company expanding the number of persons in the excluded classifications or purporting to create new classifications, job titles and position descriptions, while the union scrambled to determine whether the changes were justifiable. In the union's view they often were not, and simply resulted in an erosion of bargaining rights, diminishing the work opportunities available to trade union members.

8. From the union's point of view the "cat and mouse game" had many anomalous and undesirable results. Groups of employees having similar training, experience, education, and job functions were divided — some being excluded from the bargaining unit and some being included. In an integrated contiguous work group, some employees might be covered by the

collective agreement, while others would not be. Work in progress passed from individuals in the bargaining unit, to persons excluded, and back again, and bargaining unit personnel performed co-ordinating functions for both bargaining unit and non-bargaining unit employees. Bargaining unit members could be laid off while non-bargaining unit employees performing similar jobs were retained. In the union's view, the seniority rights and job security of members in the bargaining unit were being undermined, and their right to transfers and promotions was artificially impeded. The situation made it much more difficult to negotiate a rational job structure with wage differentials corresponding to real differences in skill and responsibility.

9. All of these issues surfaced during the negotiation of the 1981 collective agreement. Those negotiations focused on a number of *individuals* said to be performing bargaining unit work (and, as such members of the bargaining unit to whom the agreement should apply) and a number of designated *job classifications* which the company treated as excluded from the unit, but which the union argued involved clerical work properly within the scope of the bargaining unit description. The classifications in issue were the following:

- 1) Logistics Liaison Officer
- 2) Teletype Operator
- 3) Technical Writer
- 4) Technical Illustrator
- 5) Tool Designer
- 6) Advertising Officer
- 7) Sales Promotion Assistant
- 8) Data Collection Coordinator
- 9) Forecast and Performance Analyst
- 10) Senior cost Estimator

10. I will be noted that of these ten classifications, only three, — Teletype Operator, Forecast and Performance analyst, and Senior Cost Estimator — are specifically excluded by Article 2.03 of the agreement. The other seven classifications are not mentioned and *prima facie* therefore, fall within the unit. However, the company took the opposite view, and over the years since 1969 had never applied the agreement to them. On various occasions the union asserted that these groups should be included in the unit; but it never pressed this position to arbitration. The dispute concerning these classifications was only a part of the much larger unit/description issue, and the union did not believe this problem could be adequately resolved by a series of ad hoc arbitration decisions. In the union's view, the problem was a general one, which could only be dealt with through joint consultation and negotiations with the company. The fact remains, however, that for many years the individuals occupying the above named classifications have been considered beyond the scope of the collective agreement, and have never had either the advantages or disadvantages of trade union representation. Some of these individuals have indicated their interest in being represented by the union. The majority have no such interest.

11. In the most recent round of negotiations the duties of the disputed classifications and individuals were considered at some length. Eventually, the company conceded that the union was right, and that the ten classifications — including the three specifically named in Article 2.03 — should properly be included within the scope of the bargaining unit. But both bargaining parties were sensitive to the wishes of the employees. The union had no desire to

“sweep-in” individuals who did not want to be union members. The result was the negotiation of an “opt-in” formula, so that individuals *currently in the company's employ* who wished to remain excluded from the unit could elect to do so, and maintain their existing status, wages and benefits. Persons electing to join the unit would carry with them their full years of service (an apparent exception to the usual method of calculating the seniority of employees transferred into the unit); but those who chose not to do so and later changed their minds, would be dealt with in accordance with the existing contractual provisions respecting transfers. The formula to which the company and the union agreed provides:

- (a) The work performed by M. J. Yoo, H. Weisenberg, R. Rouse, G. Colm, D. Pim, R. Harder and J. Hale shall be assigned to bargaining unit personnel.
- (b) The following job classifications will be covered by the collective agreement subject to the conditions set out in the sub-paragraphs below:
 - i) Logistics Liaison Officer
 - ii) Teletype Operator
 - iii) Technical Writer
 - iv) Technical Illustrator
 - v) Tool Designer
 - vi) Advertising Officer
 - vii) Sales Promotion Assistant
 - viii) Data Collection Coordinator
 - ix) Forecast & Performance Analyst
 - x) Senior Cost Estimator
- (c) Permanent employees in any of the job classifications enumerated in sub-paragraph (b) may elect to remain excluded from the Union and from the application of the collective agreement. The election must be made within sixty (60) days of ratification. If the employee makes such election, the work which he performs shall remain excluded from the bargaining unit and the collective agreement shall have no application to such employee or his work. This exemption shall continue so long as the employee continues to be employed in his current job.
- (d) Persons currently employed in such enumerated job classifications who do not elect to be excluded and all employees hired into those

job classifications after ratification shall become members of the Union in accordance with Article XX and their work shall be included in the bargaining unit.

- (e) All persons becoming members of the bargaining unit hereunder shall receive full credit for all past service for all purposes of the collective agreement.
- (f) All persons becoming members of the bargaining unit hereunder shall be placed in a wage level by the Company subject to review under Schedule B, Article 4.
- (g) If the employee makes the election to be excluded from the Bargaining Unit and later decides to enter the Bargaining Unit he shall be free to do so.

The election form given to each of the employees potentially affected reads as follow

*THE DE HAVILLAND AIRCRAFT OF CANADA, LIMITED
EMPLOYEE ELECTION FORM*

(This election form is to be used by active employees only during the period up to September 4, 1981. This form is *not* to be used for employees on Disability Leave, Workman's Compensation Leave, Vacation or on authorized Leave of Absence.

I, _____ Clock # _____ understand the options available to me with respect to a letter of Understanding between the Company and Local 673 U.A.W. on the subject of including my current job under the Scope of Recognition Article of the Collective Agreement.

I, elect to

- (a) Remain a Non-Union employee and the Local 673 U.A.W. Collective Agreement will not apply to me.
- (b) Become a member of Local 673 U.A.W. and the Collective Agreement will apply to me.

Employee's Signature

Witness

Dated Signed

Date Signed

Note: If you fail to make an election by September 4, 1981, you will be deemed to have chosen option (B) and you will be a member of Local 673 U.A.W. and the Collective Agreement will apply to you.

Elections must be made and submitted to the Personnel &
Industrial Relations Department.

12. The parties recognized that in the short run they would have to cope with an unusual situation in which *part* of a classification was included in the unit covered by the collective agreement, while *part* would be excluded. Individuals in the same classification would have different terms and conditions of employment. However, this problem was not so different from what had obtained before, when included and excluded classifications overlapped, and employees performing substantially similar work were on different sides of the unit's dividing line. The administration problems would resolve themselves in the longer run, and, the compromise was regarded as an acceptable balance of the competing interests involved.

13. Part (a) of the agreed formula (concerning Messrs. Yoo, Weisenberg, Rouse, etc.) concerned the union's contention that these named employees were doing work within classifications undisputedly part of the bargaining unit — a situation prohibited by Article XXII of the collective agreement. The union argued that they should either be treated as covered by the agreement (with appropriate wage and benefit payments, dues deductions, and so on), or, alternatively, that the company should assign the work to other members of the bargaining unit. The company agreed that these employees were in fact doing bargaining unit work. Insofar as David Pim is concerned (and he is the only one of the individuals named in sub-clause (a) who is involved in these proceedings) there has been no change in the character of his work. The parties herein are agreed that David Pim is a member of the bargaining unit, described in Article II of the agreement.

14. The new collective agreement was ratified on or about July 5, 1981. The approximately 67 employees in the enumerated classifications thus had until September 4, 1981, to decide whether they wished to become an accretion to the union's bargaining unit. About 20 of them opted to do so, and about 46 chose to remain outside the unit and the collective agreement.

15. In late August 1981, all of the employees potentially affected by the new clause were notified of a meeting to be conducted by the union for the purpose of explaining the clause, and the options open to them. Carole Aitken, the President of the local, testified that at that meeting union officials explained the history of the bargaining, and the background to the unit problem to which the new clause was directed. The union informed the employees that if they chose not to join the unit, their situation would remain the same. They would continue to be treated under the agreement as excluded individuals with whatever wages and benefits the company chose to give them. If they joined the unit they would have the benefits prescribed in the collective agreement. The union advised them that if they opted to join the unit now, they could carry with them as their unit "seniority" their full years of "service"; whereas if they chose to transfer to the unit at some later date, their situation would be no different from that of any other excluded individual transferring into the unit. In that situation their seniority would be determined by Article XVI of the collective agreement. It was the union's view that (with certain exceptions) Article XVI provided that for persons who had never been a member of the bargaining unit, bargaining unit "seniority" would only begin to accumulate on the date of entry into the unit.

16. The language of Article XVI is not as clear as it might be, but the union's

interpretation is not an unreasonable one. Consequently, it was clear, (or should have been clear,) to the employees that if they did not exercise their option to join the unit now, they might face real disadvantages if they decided to do so later. In effect, the union was prepared to waive the application of Article XVI to persons transferring into the unit pursuant to the new clause, but made no undertaking to do so at some later time.

17. At the meeting, some of the employees expressed concern about the effect of a lay-off on persons who chose to remain outside the unit. The union advised them that it had no way of foreseeing such matters, — although it was to be expected that it would be primarily concerned to safeguard the jobs of its members. Again, it should have been clear to the employees that by opting to remain outside the bargaining unit in a regime of individual bargaining, they were foregoing certain obvious benefits and protections and might find themselves at a disadvantage at some time in the future vis-a-vis employees who had those rights. It must be repeated however, that this too, is not much different from the situation prevailing before 1981.

II

18. Section 60 of the *Labour Relations Act* provides as follows:

60.-(1) Where an employer and a trade union that has *not been certified as the bargaining agent for a bargaining unit of employees of the employer enter into a collective agreement*, or a recognition as provided for in subsection 3 of section 15, the *Board may, upon the application of any employee in the bargaining unit or of a trade union representing any employee in the bargaining unit*, during the first year of the period of time that the first collective agreement between them is in operation or, if no collective agreement has been entered into, within one year from the signing of such recognition agreement, *declare that the trade union was not, at the time the agreement was entered into, entitled to represent the employees in the bargaining unit.*

(2) Before disposing of an application under subsection 1, the Board may make such inquiry, require the production of such evidence and the doing of such things, or hold such representation votes, as it considers appropriate.

(3) On an application under subsection 1, the onus of establishing that the trade union was entitled to represent the employees in the bargaining unit at the time the agreement was entered into rests on the parties to the agreement.

(4) *Upon the Board making a declaration under subsection 1, the trade union forthwith ceases to represent the employees in the defined bargaining unit in the recognition agreement or collective agreement and any collective agreement in operation between the trade union and the employer ceases to operate forthwith in respect of the employees affected by the application.*

(Emphasis added)

19. As we have already noted, all of the individuals bringing this application (with the exception of David Pim) are employees who have opted to remain *excluded* from the bargaining unit pursuant to the “opt-in” formula set out above. These employees contend that the ten classifications potentially affected by the arrangement the union and company have concluded, cannot be added to the existing bargaining unit, in whole or in part, because the proposed unit is “inappropriate”, and not such as this Board would certify; moreover, in respect of three classifications, at least, it is reversing a situation which has existed since the Board’s certificate in 1954. The applicants argue that the union has never been certified to represent either the accretion, or the “new unit” which arguably results when the accretion is added to the existing bargaining unit configuration. In the alternative, the applicants contend that if it is legally possible for the parties to negotiate the above-mentioned amendment to the bargaining unit, it can only be maintained if the majority of the employees in the subject classifications support the union — which is not the case here. The applicants submit that the Board should set aside the agreement insofar as it purports to affect *any* of the employees in the ten classifications potentially affected. In the applicant’s submission, the (approximately) twenty employees who opted to join the bargaining unit have no right to do so unless the majority of their co-workers are in favour, and in consequence, the Board should declare that the agreement has no application even to those who have voluntarily chosen to be covered by it.

20. The union argues that it has been certified to represent *a* unit of employees although perhaps not *the* unit which appears in the current collective agreement (or any agreement since 1969 for that matter). To permit an attack on jointly negotiated accretions to the bargaining unit would frustrate the parties’ attempts to redraw the bargaining unit in light of current collective bargaining realities. The union argues that for the purpose of section 60, there is only one “defined bargaining unit in the collective agreement” [see section 60(4)], and that is the unit *as a whole* including the added classification. The phrase “bargaining unit” means precisely the same in section 60 as it does in the companion termination provision section 57; namely, the whole or combined unit as defined in this collective agreement. There is no doubt about the union’s right to represent the majority of the employees in that unit. The accretion does not stand by itself as a separate unit within which the union must demonstrate majority support. So long as the “added — on portion” of the unit does not dilute the union’s overall majority status in the combined group — as it could not if the accretion was relatively small and the existing unit did not contain a large group of non-members, — the agreement is beyond challenge. In this respect, the union argues, the situation is no different from any other voluntary recognition arrangement which embraces employees or classifications of employees who do not wish to be represented. In the ordinary course, the minority wishes are always subordinated to those of the majority. The only difference in this case is that instead of relying upon membership cards, the union relies upon the membership support established by its existing collective agreement.

21. On this branch of its argument the union relies on *Metcalf Realty Limited* [1965] OLRB Rep. Sept. 385. In that case, as in the present one, a union and employer negotiated an addition to the recognition clause of a collective agreement so as to add certain classifications that had previously been excluded. The Board set out the standard of representation which the union must meet in these circumstances as follows:

“Since the employees for whom the applicant is seeking certification were included in the bargaining unit for the first time in the current collective

agreement, and the applicant has challenged the validity of their inclusion, the onus rests on the respondent and the intervener to satisfy the Board that at the time they entered into the agreement the intervener represented a majority of the employees in the bargaining unit. This means the parties must establish that on the relevant date the intervener represented a majority of the employees in the overall bargaining unit covered by the current collective agreement. It is not necessary, however, for the intervener to establish that it represented a majority of the employees in the job classifications that were included in the bargaining unit for the first time in the existing agreement.”

22. On this test, the union argues, the parties could have “negotiated in” all ten classifications without reference to the employees at all. Indeed, seven of those classifications, — including Technical Writers and Illustrators — have properly been part of the unit since at least 1969. The company’s failure to apply the agreement to them cannot alter its terms. The only true “accretion” is the inclusion of those classifications (Teletype Operator, Senior Cost Estimator) which have previously been expressly excluded. Finally, the union points out that it did *not* ignore the wishes of the employees. The only persons who have been added to the unit are those who actually wished to be represented by the union. This group is the only real “accretion” to the unit, and each and every member of that group has indicated his desire to be represented by the union.

23. With respect to David Pim, the union argues that he is not a member of any of the added classifications, but of the “main unit”, so that even if the accretion theory is accepted, his situation is not different from that of any other employee hired, transferred or demoted into the unit. Section 60 is not available to him or, if available at all depends upon a definition of the term “bargaining unit” appearing in section 60, in which the union’s majority representation is beyond question.

III

24. It will be convenient to deal first with David Pim. He is not a member of the accretion, however one defines it. If one accepts the applicants’ submission that the term “bargaining unit” in section 60 refers to the accretion or voluntarily recognized portion of the unit, then Pim is not an employee in that group. In order for Pim to have status to bring this application, one would have to say that the term “bargaining unit” refers to the “combined unit” (i.e. old unit plus accretion). There is no doubt about the union’s right to represent the vast majority of the employees in that grouping. The applicants do not challenge this proposition. In other words, for Pim to have status to bring this application, one must ascribe a meaning to the term “bargaining unit” which results in a situation fully in accord with the majority representation principle embodied in the Act, and, in our view applicable to section 60. If Pim were the only applicant then, this application would have to be dismissed.

25. The short answer to the rest of the applicants is that none of them are “employees in the bargaining unit”, however, it is defined. They have opted out. The collective agreement does not apply to them. They have no status under section 60 to challenge the choice of their co-workers.

26. The recognition clause of the collective agreement in this case is somewhat unusual.

It is not framed solely with reference to “generic” groups of employees (production, office and clerical, etc.), nor is it framed solely with respect to specific classifications which are to be included or excluded. In addition to these familiar ways of describing a bargaining unit, the employer in this case has agreed to voluntarily recognize the union’s bargaining rights for certain individuals when (and only when) those individuals indicate their desire for trade union representation. No one can be swept in against his wishes, and, in this sense, the standard of “representativeness” constructed by the parties to this agreement is much more stringent than the ordinary majority principle recognized throughout the *Labour Relations Act*. It is difficult to characterize this as a “sweetheart arrangement” falling within the mischief to which section 60 is directed. The necessary condition for inclusion in the unit is a voluntary signification that each individual wishes to be represented.

27. Strictly speaking, since none of the applicants (except Pim who we have already dealt with) is an employee in the bargaining unit, this application must be dismissed on that ground alone, and it is unnecessary to consider the general effect of the parties’ amended recognition clause, or the possible application of section 60 had this proceeding been brought by an individual with status to do so. We might note however, that at the time the collective agreement was actually extended to the employees in the accretion, each and every one of them had opted for trade union representation. The effective date of the voluntary recognition — that is, the date on which the union acquired and the employee recognized the union’s representational rights — was the date on which the employee exercised his option. It is a little difficult to see how it could be said that, at that time, the trade union did not represent them within the meaning of section 60(3) of the Act. Finally, if the Board were to apply *Metcalfe Realty*, the only decision precisely on point, the union’s majority status would be affirmed. As we have already noted, unless one takes the term bargaining unit to mean “the accretion” — a position rejected in *Metcalfe Realty* and different from the meaning ascribed to the term in section 57, — then the union has more than enough support among the employees. Accordingly, even if this application had been brought by individuals having status to do so, it is doubtful whether we would have reached a different conclusion.

29. For the foregoing reasons, the application must be dismissed. We do not wish to leave this matter however, without expressing our appreciation to counsel for the parties for the able submissions which they both made on all aspects of the case.

1488-81-M John Vermeer, Applicant, v. Ontario Public Service Employees Union, Respondent, v. The Ontario Council of Regents of Colleges of Applied Arts and Technology, Respondent.

Colleges Collective Bargaining Act – Religious Exemption – Whether applicant holding sincerely held religious beliefs – Board not judging merits of particular belief

BEFORE: G. Gail Brent, Vice-Chairman, and Board Members E. J. Brady and H. Simon.

APPEARANCES: *Gerald Vandezande for the applicant; Grant W. Bruce for the respondent trade union.*

DECISION OF THE BOARD; December 15, 1981

1. The applicant has applied to the Board, pursuant to section 53(2) of the *Colleges Collective Bargaining Act*, R.S.O. 1980, c. 74 (hereinafter referred to as “the Act”) for an exemption from paying dues or contributions to the respondent union.

2. The applicant has been employed at Mohawk College since September 1, 1969. Prior to the collective agreement which came into effect on or about September 1, 1981, there was no mandatory dues check-off for all employees in the bargaining unit. The applicant has never joined the union, nor has he ever authorized the deduction of dues from his salary.

3. The applicant testified at length concerning his religious beliefs and the basis of his objection to paying union dues. He is a member of the Emmanuel Christian Reformed Church to which he contributes about \$120.00 per year, and his two oldest children attend Calvin Christian School, a private school which provides its students with a Christian education. The essence of his objection to paying any dues or contributions to the respondent trade union, as the Board understands it, is that the union does not overtly acknowledge God as the ruler of the earth, and the Bible as God’s word. He also objects to the respondent’s defence of the right to strike because he believes that strikes are against his Christian beliefs and are contrary to the obligation to serve God to the best of one’s ability.

4. The applicant has attended a few meetings of the respondent in the past, but has consistently refused to join, and has always given his religious beliefs as the reason for his refusal.

5. In *Wybenga*, [1976] OLRB Rep. Aug. 422, the Board said, at paragraph 4:

It making its determination the Board applies a subjective test of sincerity. It is not appropriate for the Board to sit in judgment of the applicant’s beliefs and determine whether those beliefs are right or wrong, reasonable or unreasonable, justified or unjustified. The question the Board must ask itself, then, is whether the religious beliefs expressed are truly those of the applicant.

6. The Board is of the opinion that the approach taken in *Wybenga* is the correct one. It would be entirely inappropriate for a body such as this to try to determine whether the applicant was right, or even whether his beliefs conformed to those of his particular faith. This

Board was not established to sit in judgement of the worth or correctness of any set of religious beliefs or to determine what is acceptable religious dogma. The test is the subjective test, as adopted in *Wybenga*, and the questions to be asked are:

- (a) Are the beliefs sincerely held?
- (b) Are the beliefs religious?
- (c) Are those beliefs the cause of the objection?

7. In *Henry Funk v. The Manitoba Labour Relations Board* 76 CLLC ¶ 14,006 (Man. C.A.) the Court considered the test to be applied in dealing with language similar to that found in this Act. The Court found that the Board erred in basing its decision on the tenets of Mr. Funk's church, rather than on his beliefs. At pages 36 and 37 of the report the Court remarked that the central inquiry would be whether the applicant was sincere in his belief, and that, once one is satisfied that the applicant was sincere, the matter should be determined. In *Re Civil Service Association of Ontario (Inc.) and Anderson et al* (1975), 9 O.R. (2d) 341 (H.C., Divisional Court) the Court was faced with language identical to that in section 53(2). Mr. Anderson had been granted a religious exemption by the Ontario Public Service Labour Relations Tribunal. He was a member of the United Church who believed that strikes were morally wrong. The Tribunal considered the question to be the personal, sincerely-held religious beliefs of the applicant, and the Court upheld that view. In particular, at pages 344 and 345 the Court, relying on *Donald v. Board of Education for City of Hamilton*, [1945] O.R. 518; [1945] 3 D.L.R. 424, declined to assess the correctness or acceptability of Mr. Anderson's religious beliefs once it was determined that this beliefs were religious.

8. In this case the applicant appears to be sincere in his beliefs and the beliefs are religious in nature. His objection to the respondent is based on his religious beliefs. Given all of the authority, this Board must grant the applicant's request for exemption.

9. Mr. Bruce argued eloquently against the application, but his arguments were directed more against the principle of granting exemptions than against the applicant's situation. The respondent is obliged by the Act to represent the applicant, even though he is not a member, and to bargain on his behalf. It is thus providing him with services from which he benefits and for which he is required to pay nothing. If the respondent is to bear the obligation of representation, then it only seems fair that it should receive some fee for its services. The respondent here is in an especially vulnerable position because, unlike those governed by the *Labour Relations Act*, those governed by this Act can apply for exemption long after the first collective agreement. Therefore, the respondent is faced with the prospect of a changing population of employees who may apply for exemption at any time. Despite the persuasiveness of these arguments, this Board is confined to considering those matters set out in section 53(2), and the arguments presented by Mr. Bruce raise issues beyond the scope of this Board.

10. For all of the reasons set out above, the application for exemption is granted. The Board will retain jurisdiction to determine the charity to which the amounts deducted from the grievor's salary should be remitted in the event that the parties are unable to agree on one.

1713-81-R Canadian Union of Operating Engineers & General Workers, Applicant, v. The Corporation of the Town of Orangeville, Respondent.

Bargaining Unit – Certification – Whether unit confined to sports complex of town appropriate – Board policy on municipal bargaining units – Whether applicant having status to make “craft” application

BEFORE: M. G. Mitchnick, Vice-Chairman, and Board Members H. J. F. Ade and W. F. Rutherford.

APPEARANCES: *M. O'Malley and K. Wagstaff for the applicant; D. Jane Forbes-Roberts and Norman Keith for the respondent.*

DECISION OF THE BOARD; December 9, 1981

1. This is an application for certification.

• • •

3. The Board finds that the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act*.

4. The applicant seeks to be certified for a bargaining unit described as follows:

All employees of the Corporation of the Town of Orangeville employed at the Orangeville Sports Complex in Orangeville, Ontario, save and except foremen and foreladies, persons above the rank of foremen and foreladies, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period.

In doing so, the applicant claims “craft status” and relies upon the provisions of section 6(3) of the Act which reads:

Any group of employees who exercise technical skills or who are members of a craft by reason of which they are distinguishable from the other employees and commonly bargain separately and apart from other employees through a trade union that according to established trade union practice pertains to such skills or crafts shall be deemed by the Board to be a unit appropriate for collective bargaining if the application is made by a trade union pertaining to such skills or craft, and the Board may include in such unit persons who according to established trade union practice are commonly associated in their work and bargaining with such group, but the Board shall not be required to apply this subsection where the group of employees is included in a bargaining unit represented by another bargaining agent at the time the application is made.

5. The respondent disputes the appropriateness of that unit, and instead puts forward a unit encompassing all of its outside employees, none of whom have ever been organized. This

would include employees in the Departments of Parks and Recreation and of Public Works, as well as those in the Department referred to as the Sports Complex.

6. There are 8 employees working full-time in the Sports Complex. Because one of the duties of the job involves monitoring the Arena's two 75-horsepower compressors, a "B" class refrigeration ticket has always been encouraged by the employer, and more recently has been included as a requirement in advertisements for new hires. Six of the present eight employees have this ticket, and the other two are preparing to take the examination next May. Besides this compressor responsibility, the regular duties of the employees in the Complex include setting up and supervising all events in the Arena, cleaning up afterwards, ice maintenance, minor repairs on equipment, and, in the summer months, care and maintenance of the Town's parks, cutting grass, clearing rivers, and assorted maintenance chores of that variety.

7. Within the respondent's Parks and Recreation Department are 2 full-time park employees, with whom the Complex employees work in the summer, a concession operator, two pool attendants (within the Complex) and 9 "labourers", who also perform assorted maintenance duties similar to many of those performed by the Complex employees. The combined number of employees in these two departments alone is twenty-two.

8. Apart from the question of craft status, it appears clear to the Board that the unit sought by the applicant would not be appropriate in this case. As the Board noted, for example, in *Town of Meaford*, [1980] OLRB Rep. Nov. 1611:

4. Where an employer does business at more than one location in a municipality, the Board's general practice is to describe a separate bargaining unit for each location unless the integrated nature of the operations and/or the community of interest of employees at the different locations is such as to justify grouping the employees at the various locations into a single bargaining unit. The respondent contends, apparently on the basis of this general practice, that employees of the public works department and employees at the community centre should be included in separate bargaining units. The applicant, however, submits that the employees should be included in a single bargaining unit.

5. In certain situations, the Board has concluded that its general practice as set out above should not be followed since to do so would result in the creation of a number of artificially small bargaining units and an unduly fragmented bargaining structure. Accordingly, in the retail food industry the Board generally does not describe a separate bargaining unit for each store location, but rather includes employees at all of an employer's stores in a municipality within a single bargaining unit (see: *Oshawa Wholesale Ltd.* [1965] OLRB Rep. Feb. 584). Similarly, employees working at various locations in different municipalities for the same county or regional school Board are included in the same bargaining unit. (See: *The Cochrane-Iroquois Falls Board of Education* [1969] OLRB Rep. June 368.) In line with this approach, when dealing with municipalities as employers, the Board generally issues certificates for separate units of office staff and non-office (or "outside") staff on a municipal wide basis notwithstanding the fact that employees

may work out of different locations. See: *The Corporation of the Township of Markham* [1969] OLRB Rep. Aug. 529 and *The Corporation of the Township of Valley East*, [1970] OLRB Rep. Jan. 1213.

6. In our view, the facts of this case do not warrant a departure from the Board's general approach to describing units of municipal employees. To formalize the division of the respondent's employees into two bargaining units would result in two units of semi-skilled employees, one with four employees and the other with only three. In our view, this degree of fragmentation would not be conducive to stable industrial relations and is not warranted by the facts involved. We acknowledge that this determination may result in certain short-run difficulties for the respondent in terms of organizing its affairs for collective bargaining purposes. However, we are satisfied that it will be able to overcome these difficulties. In this regard, we would note that a number of other municipalities employing many more employees than does the respondent and having much more complex organizational structures have for years bargained for all of their non-office staff within a single bargaining unit notwithstanding the fact that the employees work in a number of different departments and are spread out over a number of different locations.

9. The applicant's claim for craft status is based on the fact that all of the Sports Complex employees are now required to have "B" class refrigeration tickets, notwithstanding the limited extent to which this particular skill requirement forms a part of the employees' overall duties. There are, however, three conditions which an applicant must meet in order to bring itself within the provisions of section 6(3). These are:

- (1) whether the employees whom the applicant claims to represent are employees who exercise technical skills or who are members of a craft by reason of which they are distinguishable from other employees;
- (2) whether these employees commonly bargain separately and apart from other employees through a trade union that according to established trade union practice pertains to such skills or craft;
- (3) whether the application is made by a trade union pertaining to such skills or craft.

10. On the facts before the Board, it is questionable whether the employees covered by the application can be said to meet the requirement of condition 1. More importantly, however, there was no evidence whatever put forward by the applicant to support a claim under conditions 2 or 3. The Board discussed these requirements at length in the *Dupont of Canada* case, [1965] OLRB Rep. Jan. 539. There the Board stated, at page 541 ff.:

In our opinion, the evidence adduced on behalf of the applicant falls far short of proving that employees in maintenance departments of manufacturing firms such as the respondent or in manufacturing,

commercial or industrial firms in general, *commonly* (as distinguished from what is more probably a few scattered and isolated instances of bargaining in maintenance divisions of some particular employers in certain industries) *bargain separately and apart from other employees*.

Counsel for the applicant relies on *Telfer Paper Box Co. Ltd.*, [1963] OLRB Rep. Nov. 45 to support his argument that it is not a condition precedent in order to prove, within the meaning of section 6(2), that the employees *commonly bargain separately and apart* from other employees, to establish a history of collective bargaining in the particular industry or firm concerned. He contends that in the absence of clear language to that effect it cannot be taken to have been the intention of the Legislature, in derogation of its recognition of craft rights, to restrict and circumscribe the operation of section 6(2) to those particular industries or areas in which craft bargaining had been established at the time of the enactment of the section.

While the Board in the *Telfer Paper Box Case* stated that previous bargaining history by an applicant's craft in the particular industry there concerned was only one factor among others to be considered in determining the application of section 6(2), the Board in that case did not say that in the absence of such a factor it would dispense with the requirement of proof of at least a bargaining history in the particular industry by a craft union closely akin to the applicant or of some history of bargaining by the applicant or craft union akin to it in allied or similar industries. Indeed, the Board in the *Telfer Paper Box Case* found, and from the record this appears to have been important to the decision in that case, that the paper box industry had not always been organized on an industrial basis but that a union pertaining to a craft closely akin to the applicant in that case had previously been permitted by the Board to carve out a craft unit from an industrial unit in a paper box factory. In our opinion, while the principle enunciated in the *Telfer Paper Box Case* which was obviously decided on a state of facts quite distinguishable from those in the instant case may to some extent assist the applicant, it plainly does not constitute any precedent for the application of section 6(2) to the facts of this case.

As has often been the case in applications of this nature, counsel has relied heavily in his argument on the trade classifications and work done by the employees in question, together with the fact, as he argues, that they have clearly indicated their democratic wishes, by signing cards, to be separately represented by the applicant as their collective bargaining agent. As has been pointed out by the Board in previous cases, (see e.g. *The Canadian Foundries & Forgings Limited Case* (1961) C.C.H. Canadian Labour Law Reporter, ¶16,203, C.L.S. 76-753, and *The Cooper & Beatty Limited Case*, (1957) C.C.H. Canadian Labour Law Reporter, Transfer Binder 1955-59, ¶16,100, C.L.S. 76-581), these are not the only considerations for the application of the first part of

section 6(2); if they were, every industrial or commercial undertaking and part thereof in which tradesmen were employed would, contrary to the intent and purpose of the section, be vulnerable to indiscriminate fragmentation into separate bargaining units.

The principles and requirements of proof of a bargaining history enunciated and applied from time to time by this Board in dealing with cases affected by the section are to be found in the following, among other cases, *The Cooper & Beatty Limited Case*, *ibid*; *The Firestone Tire & Rubber Company of Canada Limited Case*, *ibid*; *The Telfer Paper Box Case*, *ibid*; *Art Wire & Iron Company Case*, (1954) C.C.H. Canadian Labour Law Reporter, Transfer Binder 1949-54, ¶ 17,080, C.L.S. 76-437; *Brockville General Hospital*, (1957) C.C.H. *ibid*, ¶ 16,061, C.L.S. 76-543; *St. Mary's General Hospital (Kitchener)*, O.L.R.B. Monthly Report, February, 1963, p. 496; *Kent Tile & Marble Co. Case*, (1961) C.C.H. Canadian Labour Law Reporter, ¶ 16,204, C.L.S. 76-756; *Canadian Foundaries & Forgings Limited Case*, *ibid*, etc.).

On the basis of the principles which this Board has applied in the past in cases of this nature, we are compelled to find on the evidence placed before us that the applicant has failed to bring itself within the provisions of the first part of section 6(2) of the Act.

11. The Board accordingly finds that the applicant has not established the requirements for a "craft" unit, and that the unit sought by the applicant is not appropriate in the present case. At the very least a non-office unit including both the Sports Complex and the Parks and Recreation Department would be necessary and appropriate, and more likely including the Public Works Department as well.

12. Based on all of the evidence before it, the Board is satisfied that less than forty-five per cent of the employees of the respondent in the bargaining unit at the time the application was made were members of the applicant on November 18, 1981, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

13. The application is therefore dismissed.

1421-80-M Sinclair Welding Limited, Applicant, v. International Union of Operating Engineers, Local 793, Respondent.

Construction Industry Grievance – Damages – Unlawful picketing causing loss to company – Whether entitled to damages for period company considered itself not bound by agreement – Whether delay in filing grievance affecting damages claim

BEFORE: Ian Springate, Vice-Chairman, and Board Members H. J. F. Ade and C. A. Ballentine.

APPEARANCES: *K. W. Kort for the applicant; S. B. D. Wahl, E. A. Ford and G. Steers for the respondent.*

DECISION OF THE BOARD; December 8, 1981

1. This is a referral of a grievance to the Board pursuant to section 112a (now section 124) of the *Labour Relations Act*. For ease of reference the applicant will henceforth be referred to as “the company” and the respondent as “the union”.

2. On June 4, 1979, the Board certified the union as the bargaining agent for certain employees of the company. Included in the bargaining unit were persons engaged in the operation of cranes in all sectors of the construction industry, including the industrial, commercial and institutional sector (“the ICI sector”). Although the parties apparently now enjoy a fairly smooth working relationship, certain events subsequent to the union’s certification gave rise to a considerable amount of litigation before the Board.

3. On March 10, 1981, the same panel of the Board as is seized with this matter, issued a decision relating to twelve separate grievances filed by the union against the company. See: *Sinclair Welding Limited*, [1981] OLRB Rep. March 331. For the purposes of this decision, the parties are in agreement that the Board can take note of the facts set forth in that decision. The only other events relied on by the parties concern a proposed application by the company for a cease and desist order, a matter which is referred to more fully below. In its decision of March 10, 1981, the Board set out the following facts:

... On June 4, 1979, the Board certified the [union] for certain employees of the [company], including those engaged in the operation of cranes. By force of the province-wide bargaining provisions of the Act (enacted as 1977 c. 31), the [company] automatically became bound to the Operating Engineers’ provincial agreement in the ICI sector. Although the agreement itself purports to cover a number of sectors, at the hearing the parties agreed that it was binding on the [company] only with respect to the ICI sector.

5. Mr. Wiles [the president and major shareholder of the company which is based in Belleville] testified that following the certification of the union he was advised by a lawyer [Mr. K. W. Kort, a Belleville lawyer experienced in labour relations matters] that the [company] was automatically bound to the provincial agreement in the ICI sector. Mr. Wiles, who at one time prior to the enactment of the province-wide bargaining

provisions of the Act had been responsible for administering a collective agreement, doubted the accuracy of the lawyer's advice. For his part, Mr. Steers [a business representative of the union in the Belleville area] appears to have been totally unaware of the province-wide bargaining provisions of the Act and unaware of the fact that the [company] was automatically bound by the provincial agreement in the ICI sector.

6. On June 14, 1979, Mr. Steers attended at the [company's] premises to discuss signing a collective agreement, but nothing was resolved. Subsequently, the [union] asked the Minister to appoint a conciliation officer, and on July 11, 1979 a meeting was held between the parties with a conciliation officer present. Nothing was resolved at this meeting. On August 3, 1979, the Minister indicated that he would not be appointing a conciliation board. On August 18, 1979 the employees of the [company] outside the ICI sector covered by the Board's certificate were in a legal position to strike. However, since the ICI sector was already covered by a subsisting collective agreement, employees working in this sector were not in a legal strike position.

7. On September 19, 1979 Mr. Steers and a number of other persons began to picket in front of the [company's] premises. The two employees who belonged to the... trade union refused to cross the picket line. Mr. Steers was overheard telling the two union members not to cross the line, and also that they should not work for the [company] even when no picketers were present. As already noted, Mr. Steers was apparently unaware of the fact that the provincial agreement already covered the [company's] employees in the ICI sector, and accordingly, he did not distinguish that sector from the others. Pickets also began to appear at the [company's] job sites, including sites in the ICI sector. Picketing activity continued on a regular basis through the month of October, 1979. Partway through October, both of the employees who belonged to the... union informed the [company] that they were quitting its employ to obtain work elsewhere. The [union's] picketing activity became increasingly sporadic in November, and by late December of 1979 it had ceased altogether.

8. In January, 1980, Mr. Mitchell [an employee of the company] applied to the Board to have the [union's] bargaining rights terminated (File No. 1914-79-R). The matter came on before a differently constituted panel than the one seized of these matters. It is agreed that at the hearing into the termination application, the members of the Board panel explained to the parties that they were bound to the provincial agreement in the ICI sector. In a written decision released on February 4, 1980, the Board again stated this to be the case. The Board also dismissed the termination application in its entirety. The application was clearly untimely with respect to the ICI sector, and with respect to the other sectors, because of Mr. Wiles' involvement with the application, the Board was not prepared to conclude that it was a clearly voluntary application on the part of Mr. Mitchell.

9. Apart from both being in attendance at the hearing into the termination application, the...[parties] had no involvement with each other from late January [this should have read late December], when the [union] completely stopped its picketing activity, until March of 1980. On March 10, 1980, the [union] sent a grievance to the [company]. The grievance (subsequently referred to the Board in File No. 0287-80-M) related to a job site on Jamieson Bone Road in Belleville, where Mr. Mitchell had been operating a crane used in the erection of a pre-engineered building for a transport firm. The work clearly came within the ICI sector. The grievance stated as follows:

"The nature of the grievance is as follows: The employer has failed or refused to employ members of the Union in good standing for work covered by the collective agreement and to call the Union Office whenever personnel are required.

Remedy requested: That the employer replace all personnel who are not in good standing for the Union with those who are and further that the employer pay to the I.U.O.E. Local 793 in trust, all wages and other monetary items set out in the collective agreement for all hours earned by personnel not in good standing with the Union."

On June 3, 1980, the [union] filed a second grievance with the [company], and subsequently the other grievances followed. The grievances all contain wording similar to the one quoted above, although they each relate to different job sites.

4. In the proceedings arising out of the grievances filed by the union, the company contended that the provisions of the provincial agreement alleged to have been violated, including the provision requiring that employees working under the agreement be union members, had not in fact been violated or, in the alternative, if they had been, it would be unfair to award any damages to the union. In dealing with this latter contention, the Board reasoned as follows:

12. In support of this...contention, the [company] relies on the fact that Mr. Steers, on behalf of the [union], directed two crane operators belonging to the union not to work for the [company], and further picketed the [company's] job sites, including those in the ICI sector. At the hearing, counsel for the [union] contended that even if this conduct on the part of the [union] had been improper, nevertheless, the [union's] conduct could not serve to amend the collective agreement so as to do away with the [company's] obligations under the agreement.

13. To all intents and purposes, the [union's] conduct after it was certified indicated very clearly that it did not regard itself as bound by the provincial agreement insofar as the [company] was concerned. At law, the [union] and the [company] did in fact remain bound to the agreement, and the [union's] conduct cannot be viewed as having amended the agreement in any way. Nevertheless, in our view, because of its conduct it

would be inequitable for the [union] to now obtain damages for a period of time when the [company] reasonably believed it need not conform with the terms of the agreement. During this time period, the pre-conditions for the application of the principle of estoppel were clearly present. See: *Canadian General Electric Co. Ltd.* (1971), 22 L.A.C. 149 (Johnston).

14. As already indicated, the application of the principle of estoppel does not have the effect of amending a collective agreement. Rather, what it does do is prevent a party from enforcing its strict rights under the agreement when, because of its own conduct, it would be inequitable to allow it to do so. This being the case, notice of a reversion to the strict terms of the agreement will generally bring the estoppel to an end. Further, arbitrators have generally adopted the position that the filing of a grievance will usually be sufficient notice of a reversion to the strict terms of the agreement. See: *Hydro-Electric Power Commission of Ontario* (1975), 8 L.A.C. (2d) 276 (Schiff). Here, the [union's] first grievance, that dealing with the Jamieson Bone Road project, indicated very clearly that the [union] wanted the terms of the provincial collective agreement applied to work performed by the [company]. In our view, the effect of this grievance was to bring the estoppel to an end since from this point on the [company] was aware of the [union's] intention to rely on the terms of the collective agreement. In all of the circumstances then, we are of the view that the [union] is estopped from now claiming any damages as a result of the [company's] non-compliance with the provincial collective agreement either prior to or on the Jamieson Bone Road project, but that the grievance filed with respect to that project served to bring the estoppel to an end.

5. On May 23, 1980 the instant grievance was filed by the company against the union alleging that the union violated the provincial agreement by engaging in a strike in the ICI sector during the term of the agreement. Particulars filed in support of the grievance contend that commencing on September 19, 1979, union officials picketed the company's ICI projects, and that Mr. Steers advised certain of the company's ICI clients that the union was in a legal strike position with respect to the company. According to the particulars, these actions resulted in the company's removal from a number of ICI job sites. The company now seeks over \$100,000.00 as compensation from the union as a result of its alleged actions.

6. The union's position is that the company is foreclosed by its own conduct from claiming damages for the union's breach of the provincial agreement. In this regard, at the hearing the union's primary contention was that just as the union was found to be estopped from claiming damages for a breach of the provincial agreement at a time when it indicated it did not regard itself as bound by the agreement, so the company should be estopped from claiming damages during the period that the company indicated it did not regard itself as bound by the agreement.

7. Although the company grievance is dated May 23, 1980, it indicates that it covers the period of "September 19, 1979 and continuing". The time period involved spanned two provincial agreements. In a decision dated March 16, 1981 (see: [1981] OLRB Rep. March

343), the Board ruled that it had jurisdiction to deal with the grievance insofar as it applied to both agreements. The Board did not, however, address itself to the effect of the delay on the part of the company in filing the grievance, or the possible application of the principle of estoppel.

8. Article 6.7(b) of the current provincial agreement provides that employer grievances shall be commenced within ten full working days after the circumstances giving rise to the grievance occurred or originated. At the hearing dealing with this aspect of the proceedings, neither party addressed themselves to the effect of article 6.7(b). Accordingly, there was no discussion as to whether the ten day time limit had been waived by the union, whether the Board should extend the time for filing the grievance, or, indeed, whether the time limit ever applied to this referral in that section 124 states that a party can refer a grievance to the Board "notwithstanding the grievance and arbitration provisions in a collective agreement". In these circumstances, the Board will concern itself only with the issue dealt with by the parties, namely, whether, quite apart from article 6.7(b), the company's conduct in waiting until May 23, 1980 to file its grievance forecloses it from now claiming damages for the union's breach of the provincial agreement.

9. It is clear that shortly after the union was certified, Mr. Wiles was advised of the applicability of the provincial agreement in the ICI sector by counsel experienced in labour relations matters, but he chose to ignore that advice. Subsequent to the commencement of the strike, company counsel prepared an application to the Board for a cease and desist order on the basis of the claim that in the ICI sector the strike was unlawful. A copy of the document was forwarded to the union, but the application was never proceeded with, apparently due to Mr. Wiles' belief that his counsel had an incorrect view of the law. In December of 1980, the union ceased all picketing activity against the company. In January of 1980, the Board in the context of the termination proceedings, orally advised the parties that they were bound by the provincial agreement in the ICI sector, and this was stated again in writing on February 4, 1980. On March 10, 1980, the union filed a grievance with respect to the company's alleged violation of the provincial agreement on a job project then underway. Notwithstanding all of the above, it was only on May 23, 1980 that the company filed its grievance against the union.

10. We have some doubts as to whether the principle of estoppel applies in this case so as to bar the company's grievance. Whereas the union by withdrawing its members from their active employment with the company and picketing the company's ICI job sites made it clear to the company that it did not regard itself bound to the provincial agreement, and by extension that the company need not employ union members to operate its cranes, there was no clear-cut message from the company to the union that the company did not regard itself as bound by the agreement and that the union was free to engage in a strike in the ICI sector. Instead, what the company did was essentially to acquiesce in the union's conduct and to remain silent about the matter until some eight months later.

11. Generally, arbitrators have imposed some time limitation on the use of the grievance procedure even where such a time limit is not set out in the relevant collective agreement. This point was stated as follows by Professor Laskin (as he then was) in *Re Canadian General Electric Co. and United Electrical, Radio and Machine Workers of America* (1952), 3 L.A.C. 980 at pp. 982-983:

Neither the Agreement under which this grievance was filed nor the preceding Agreement contains any time limitations for the filing of

grievances. Is there, then, any basis on which a grievance can justly be declared "stale" or "out of time", and thus subject to rejection without consideration of its merits? And if there is such a basis of rejection, is this case within its limits? In considering the problem it is safe to start with the proposition abstract though it may be, that a grievance about an alleged violation of a Collective Agreement should be brought within a reasonable time after the alleged violation has occurred. It should make no difference to the application of this proposition that the grievors were unaware that they had a right to complain, unless they were in some way misled by the Company. A Collective Agreement is binding on the Union and employees as well as on the employer, and it is a chief function of a Union as a Collective Bargaining Agent for employees to be zealous in asserting rights of employees under a Collective Agreement. Absent bad faith on the part of the employer, a Union which misconceives its rights or those of employees and thereby fails to press them, should not be permitted to make a retroactive claim to re-open, after the lapse of a reasonable time, transaction which have been completed, as, for example, cases of piece-work jobs for which payment has been made and accepted without expression of dissatisfaction.

Where the alleged violation by the Company is of a continuing nature, in the sense that the jobs or situations giving rise to the violation are of a recurring kind, it does not follow that failure of the Union or an employee to press for relief on certain of those jobs or matters bars them from raising the question in any subsequent case. Again, the relevant inquiry is whether the claim for relief was made within a reasonable time after the matter in issue arose. It is not, in the Board's view, a tenable principle that waiver of rights in any one case amounts to a complete waiver for all like cases. So long as the Collective Agreement affords a basis for relief against any situation, the party entitled to its benefits may assert its rights or refrain from asserting them in any particular instance, subject, perhaps to estoppel if there has been any misleading representation upon which the other party has relied to its detriment.

Applying the foregoing propositions to this case, it is clear that (subject to estoppel) the Union or an employee could at any time assert a claim for average earnings for repair work at or about that time, regardless of a previous failure to assert such a claim in respect of previous repair work. This does not mean, however, that a claim for average earnings can be made at any time for repair work done at any time. The efficient and expeditious conduct of labour relations or, what is much the same thing, the proper administration of a Collective Agreement, requires mutual recognition by the parties of a principle of repose as to all claims under the Agreement not asserted within a reasonable time and involving matters which have, to all outward appearances, been satisfactorily settled between the parties. Unless some such policy is admitted, then, having regard to continuing nature of Collective Agreements there is wide scope for harassing activities by each party with consequent danger of damage to present relations by dragging up ghosts from the past.

The principle was more recently stated as follows by Professor Arthurs in *Re Oil Chemical and Atomic Workers, Local 9-672 and Dow Chemical of Canada Limited* (1966), 18 L.A.C. 51 at p. 55:

Prompt adjustment of grievances is naturally of great importance in maintaining amicable labour-management relations. Unions have often complained of the corrosive effect of unresolved grievances of individuals who feel themselves wronged, but are unable to secure speedy redress because of management evasion or delay. Indeed, this commonplace observation is recognized by the recital in art. 5.01 that "it is of the utmost importance that adjustment of complaints and grievances should be made as speedily as possible". The whole grievance procedure, then, is based on a premise of reasonable speed. This premise becomes overt in both art. 5.01 and 5.10, which attach time limits not to the submission to arbitration, but to the period within which "final" or "satisfactory" settlement must be made. By this device, the parties are forced to determine whether the grievance has been laid to rest or whether it is still a matter of contention. The one thing the agreement does not contemplate, then, is that grievances should exist indefinitely in a state of suspended animation. Yet the possibility exists that a dormant grievance may be revived after weeks, months or even years, unless a board of arbitration has power to hold it time-barred.

To cope with an analogous problem, civil courts have developed the equitable doctrine of *laches*, which is used to deprive a lethargic party of relief which his prompt action might have secured. It has been suggested that the same doctrine exists in labour arbitration, see *Re Ottawa Newspaper Guild, Local 205, and Ottawa Citizen* (1965), 16 L.A.C. 147 (Reville, C.C.J.). While this decision was quashed on *certiorari*, 55 D.L.R. (2d) 26, [1966] 1 O.R. 669, by Gale, C.J.H.C., a careful reading of the Court's decision leaves untouched the basic premise that grievances must move promptly to arbitration, even in the absence of specific time limits in the collective agreement. The arbitrator had held that he was "deprived of jurisdiction" to hear the case on the merits by reason of delay. The Court quashing the award, stated (p. 27):

"It is one thing to hold that a claimant is barred from relief on the ground of laches or unreasonable delay, but quite a different thing to hold that jurisdiction is taken away by unreasonable delay which does not violate the express terms of the arrangement between the parties. At least the tribunal must possess power to decide the effect of the alleged delay and to that extent must entertain the matter."

None the less, the decision does conclude with an admonition to the arbitrator to canvass the actual circumstances of the case in order to determine why the request for arbitration was delayed and what harm, if any, resulted from the delay. Presumably, if the arbitrator had found on the basis of evidence that there was no excuse for the delay, or that some actual prejudice occurred, his holding would have been sustained. The arbitrator's power to dismiss dormant grievances, then, must rest not

upon technical equitable doctrines — this is not a civil Court — but upon considerations related to labour relations proceedings.

12. In the instant case, the company raised no explanation for its failure to grieve earlier, except for Mr. Wiles' refusal to accept the advice of a lawyer experienced in labour relations matters to the effect that the company was bound by the provincial agreement in the ICI sector. Action on the part of the company during 1979 to advise the union that the strike in the ICI sector was in breach of the provincial agreement and subject to a possible damage claim may well have caused the union to end its strike activity in that sector. In this regard it is to be noted that until January of 1980, Mr. Steers, the individual responsible for the union's tactics during the relevant period, was unaware of the fact that the company was automatically bound to the provincial agreement in the ICI sector, and that subsequent to his being advised of that fact by the Board, the union engaged in no further picketing activity. Taking all of these circumstances into account, we are satisfied that it would be inappropriate to allow the company to now claim damages back to September 19, 1979, and propose instead to limit any damages it can claim to a more reasonable time period prior to the filing of the grievance. In this regard (subject to the possible applicability of article 6.7(b) of the provincial agreement), we propose to use as the cut-off point March 10, 1980, the date prior to which the Board declined to allow the union to claim damages for the company's breach of the provincial agreement.

13. The company is claiming damages with respect to certain alleged incidents subsequent to March 10, 1980. Accordingly, this matter will be re-listed for hearing with respect to the period subsequent to March 10, 1980.

1539-81-U United Electrical, Radio and Machine Workers of America (UE), Complainant, v. **Speedex Company**, Division of Magna International Inc., Respondent.

Discharge for Union Activity – Practice and Procedure – Unfair Labour Practice – Union supporter terminated – No evidence of employer knowledge of grievor's union activity – Employer establishing disciplinary practice of discharging after three written warnings – Whether employer discharging reverse burden of proof

BEFORE; N. B. Satterfield, Vice-Chairman and Board Members J. D. Bell and S. Cooke.

APPEARANCES: *A. J. Peters, Ines Fisher and Marie Peters for the complainant; Philip J. Wolfenden and Werner Ertl for the respondent.*

DECISION OF THE BOARD; December 14, 1981

1. This is a complaint filed under section 89 of the *Labour Relations Act* alleging that the respondent has discharged the grievor Ines Fisher contrary to the provisions of section 66 of the Act. The complainant, the United Electrical, Radio and Machine Workers of America

("the union") requests that Fisher be reinstated in her job with full compensation for wages lost and that all rights and benefits available to her at the time of discharge be restored.

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3. The complaint as originally filed alleges that Werner Bareuther, assistant general manager of Speedex Company ("the employer") discharged Fisher on October 8th, 1981 because of her membership in and support for the union. He told the Board that he discharged Fisher because she had received a third written warning for a violation of the employer's published disciplinary rules. He testified that the employer has followed consistently a disciplinary practice of dismissing employees who receive a third written warning for violation of these rules. Fisher had received two written warnings prior to the one which resulted in her discharge, the first on January 13th, 1981 for leaving her place of work during working hours and the second on August 31st, 1981 for changing out of her work clothes during working hours. The culminating event occurred on October 8th when she left the employer's premises at lunch time without punching her time card contrary to a posted rule.

4. After the employer had put forth these reasons for Fisher's discharge and while the union was attempting to prove its allegation that the employer was motivated in its discharge of Fisher by her membership in and support for the union, it became necessary for the Board to adjourn the hearing until another date and to direct the union to supply particulars of all of the material facts on which it would be relying in support of its allegation. Its response to the Board's direction was contained in a letter dated November 11th, 1981 in statements to the effect that:

- (a) Werner Ertl, the employer's general manager, discriminated against Fisher by issuing a warning on August 31st, 1981 and threatened and intimidated her because of her union activity; and
- (b) Jim Evans, who was acting as production supervisor at the time, discriminated against Fisher because of her union activity by singling her out for discipline on October 8th, 1981.

5. When the complaint came back on for hearing on November 23rd, counsel for the employer advised the Board that he would address in his argument an issue of timeliness in respect of the particulars and would be asking the Board to disregard any evidence with respect to the allegations contained in the November 11th letter from the union. Accordingly, at the outset of his argument, counsel submitted that the Board should ignore all of the evidence about the two allegations since the events on which they were based were known to the union at the time this complaint was filed and should have been included in the particulars filed with the complaint. Furthermore, the union had waited until the filing of the further particulars to come forward with the allegation with respect to Ertl, when it had knowledge on August 31st of the event on which it is relying. Counsel contends that the union has failed the duty of promptness which section 72 of the Board's Rules of Procedure imposes on a party that is alleging improper or irregular conduct.

6. The Board has dealt many times with the purpose of section 72, the question of the sufficiency and adequacy of material facts and particulars and the duty of promptness. See, for example, *Boake Manufacturing Company Limited*, 56 CLLC ¶18,042; *General Freezer Limited*, 65 CLLC ¶16,019; *International Cooperage Company of Canada Ltd.*, [1963] OLRB Rep. Apr. 47. In the case at hand, the Board directed the union to file any additional

material facts and particulars on which it would be relying within a specified time limit. It complied by filing the November 11th letter. Having regard to the guidelines provided by the principles set out in its foregoing decisions, the Board does not find sufficient grounds for refusing to consider the evidence with respect to the two matters set out in the November 11th letter. The fact that the union had knowledge of these matters when it filed its complaint yet did not raise the allegations, whether standing alone or viewed together with the late filing of the allegations, does not provide sufficient grounds. The employer has not suffered prejudice or embarrassment such that would warrant disregarding the evidence of which the employer is complaining. The employer's request is refused.

7. Fisher, who was a punch press operator at the time of her discharge, was hired in January 1980. A year later she received a written warning for leaving her place of work during working hours, the first of the three written warnings for which the employer has stated she was discharged. She became aware early in May 1981 of the union's attempt to organize the employees at her place of work and she attended all three meetings of employees called by the union for this purpose. Since she speaks English as well as Portuguese, her first language, other employees attending these meetings asked her to explain what was being said. Fisher also spoke to employees in the employer's lunch room and on the bus going to and from work to try and get them to sign applications for membership in the union. She told the Board that she was not successful in signing up any employees. The union filed an application for certification with the Board on June 22nd, as a result of which the Board directed that a representation vote be held. It was held on July 21st and the ballot box was sealed without the ballots being counted. Prior to the vote, on or about July 9th or 10th, two organizers for the union were distributing leaflets to employees as they were boarding a bus on the employer's parking lot after the end of the day shift. Ertl came out to ask what they were doing on the employer's property and while he was speaking with one of the organizers, Fisher came out of the plant and asked the second organizer for some of the leaflets to give to employees who were working overtime. She took the leaflets and went back to the door by which she had exited from the plant and stepped inside to give the leaflets to three or four employees who were still at work. Fisher's attendance at the union's organizing meetings, her assistance to other employees at those meetings, her unsuccessful attempts to sign employees to membership in the union and her distribution of the leaflets are the extent of her activities on behalf of the union in evidence before the Board. The employer denies having any knowledge of her activities on behalf of the union and, indeed, the only direct evidence before the Board with respect to the possibility of the employer having knowledge of her activities is that about the distribution of the leaflets. Her own testimony in cross-examination, however, places Ertl in a position, while speaking with one of the organizers, where he could not have seen Fisher when she left the plant and came out to get leaflets from the other organizer.

8. Fisher and her mother, who is a long-time employee, were working on Saturday, August 29th, an overtime day. They were to finish work at 1:00 p.m. and both of them changed out of their working clothes and returned to their work stations before the 1:00 p.m. scheduled quitting time. Ertl, who was on his way to the shipping department about ten minutes to one, noticed both of them at their work places already changed into street clothes. He spoke to Fisher about this fact and that it was contrary to the employer's rules to change clothes during working hours, a rule of which Fisher was fully aware. Ertl told her that she would be receiving a written warning and he asked her to tell her mother that she would be receiving one too. He asked her to relay this message to her mother because sometimes Mrs. Fisher had difficulty understanding him. There were other employees working that day but Ertl was not aware of

whether they had also changed their clothes during working hours. The evidence of Ertl and Fisher reveals that there was a partition between the area in which these employees were working and that where Fisher and her mother were working. On Monday August 31st, Ertl issued written warnings to both Fisher and her mother.

9. There is conflict in the testimony of Fisher and Ertl about what was said when she was called into the office to receive the written warning. According to Fisher, Ertl commented to the effect that, if she wanted a union, she would have to go by the rules. Ertl denies that he made any reference to the union and asserts that Fisher asked him why he was picking on her and her mother because they were against the union. Having considered their entire testimony, the consistency of their evidence, their ability to resist modifying their recollection to suit their interests and their demeanor, the Board is satisfied that, if any reference was made to the union on August 31st, it was made by Fisher.

10. The ballots which had been cast in the representation vote on July 21st, were counted on October 7th and the union won the vote. On October 8th, a pay day, Fisher left the plant at lunchtime together with three other employees and went in the car belonging to one of them to the bank. She did not punch her time card either when she left or when she returned. Jim Evans, a member of the bargaining unit who is responsible for quality control in the plant, was filling in that week for the regular production supervisor who was on vacation. He noticed that Fisher was not at her machine about five minutes after the time she should have started work after the lunch break. When he could not see her around the work area, he checked her time card. It had not been punched. While he was looking for her, he met Bareuther and told him of her absence. According to Evans, he encountered her shortly before 1:00 p.m. on her way back to her work station. He inquired as to where she had been and why she had not punched her time card. The evidence establishes clearly that there was a posted rule, of which Fisher was aware, that required the punching of time cards in the circumstances under which she left the plant during the lunch break. Evans reported to Bareuther that Fisher had returned to the job but that she had not punched her time card. Since her file contained two prior written warnings and since this offence would result in a third one, Bareuther spoke with Ertl and it was decided that Fisher would be discharged. Bareuther called her to the office and advised her of this fact. She left the office and returned a short while later with her mother. While they were speaking with Bareuther, the employee in whose car Fisher had gone to the bank came into the office. He told Bareuther that he too had left the plant without punching and it was because he was late coming back that Fisher had got into trouble. Bareuther informed the employee that he would receive a written warning as well. The following day that warning was issued to him. The other two employees did not come forward and there is no evidence that Bareuther made any attempt to learn their identities. Fisher was discharged and her mother and the other employee returned to their jobs.

11. Section 89(5) of the Act places a burden of proof on the employer, in a complaint of this nature, to show that it did not discharge Fisher for her union activity or as a result of any anti-union sentiment of the employer. In the many cases of this nature with which the Board has dealt since sub-section 5 was introduced into the Act, it has required the employer to establish two fundamental facts in order to satisfy the Board that the employer has met the burden of proof imposed by sub-section 5. As stated by the Board in *The Barrie Examiner*, [1975] OLRB Rep. Oct. 745 these are:

“... first, that the reasons given for discharge are the only reasons and,

second, that the reasons are not tainted by any anti-union motive. Both elements must be established on the balance of probabilities in order for the employer to establish that no violation of the Act has occurred.”.

12. The employer in the case at hand, has come forward and given its reasons for Fisher’s discharge. The employer’s uncontradicted evidence is that it has followed a disciplinary practice of discharging employees who accrue three written warnings for the violation of the published disciplinary rules. Between January 1981 and October 1981, Fisher had accumulated three such warnings for violation of rules of which she was fully aware. The second of these warnings was given more than two months after the union applied for certification and more than five weeks before it was known that the union had won the vote. The event leading to the third warning and her discharge occurred on October 8th, the day after the ballots were counted. The union points at the quick succession with which the last two written warnings were issued and the hiatus of five months between the first one and the union’s application for certification, which was followed one month later by the representation vote, as grounds for the Board to be suspicious that the real reasons, or at least part of the employer’s reasons dismissing Fisher was her support of the union.

13. When an employer has terminated an employee at a time when there is also evidence of union activity the Board may, depending upon the circumstances, draw the inference that the employer has acted out of anti-union sentiment and therefore has acted in violation of the Act. Where, as is the case here, the employer has come forward with an explanation which establishes good cause for discharge, the Board normally requires some cogent evidence of union activity, the grievor’s participation in that activity and the employer’s knowledge of it before the Board is willing to draw an inference that the employer has acted, at least in part, out of an anti-union sentiment. As the Board has just noted, the second written warning was issued more than two months after the union applied for certification. The discharge took place some four and a half months after the date of application, but the day after the results of the representation vote became known. There is no evidence before the Board of anti-union behaviour of the employer. It cannot be said on the evidence that Fisher played a major role in the union’s campaign, although she obviously did more than those persons who merely joined the union. But what does the evidence show of the employer’s knowledge of her activity? The only objective evidence that the employer might have been aware of her activity is that with respect to the handing out of leaflets. Yet on Fisher’s own evidence, Ertl was not in a position to see her when she came out to get those leaflets from one of the the union organizers. There is not the evidence before the Board which would support even the inference that the employer was aware of her union activity let alone support the broader inference that the employer had acted out of an anti-union sentiment when it issued the third warning to Fisher and discharged her.

14. Accordingly, the Board is satisfied that the reasons given by the employer for discharging Fisher are the real reasons. Therefore the complaint is dismissed.

DECISION OF BOARD MEMBER S. COOKE;

1. I am concurring in the findings. I point out that the Board is limited from determining the issue of just cause for discharge.

2. The employer in this case gave unchallenged evidence about his discipline procedure

and seems to have carried out the process in his normal fashion. This is not to say that the employee was discharged for just cause. On the contrary, if the Board had the authority in this kind of a case as an arbitrator has under section 44(9) to "substitute such other penalty for the discharge or discipline as to the arbitrator or arbitration board seems just and reasonable in all the circumstances", I am convinced that the discharge would not stand.

3. In view of the difficulty, and in this case the failure of the union to establish anti-union animus or an unevenness of treatment such as to meet the tests of the legislation and previous cases I must concur. The needs of justice however, cry out for legislative change to give the Board the kind of jurisdiction set out above.

1580-81-U Hubert Patterson, Complainant, v. United Auto Workers Union, Respondent, v. Trailmobile Canada Limited, Intervener.

Duty of Fair Representation – Unfair Labour Practice – Grievor's discharge grievance taken to arbitration – Grievor reinstated without compensation – Whether denial of compensation result of union's mistake – Whether union arbitrary in manner of processing grievance

BEFORE: R. O. MacDowell, Vice-Chairman.

APPEARANCES: *H. Patterson for the complainant; P. White, T. Bratton, J. Tubman and T. Duff for the respondent; R. G. Ker and D. S. Fishner for the intervener.*

DECISION OF THE BOARD; December 1, 1981

1. This is a complaint under section 89 of the *Labour Relations Act* alleging a breach of section 68. Section 68 reads as follows:

"A trade union or council of trade unions, so long as it continues to be entitled to represent employees in a bargaining unit, shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit, whether or not members of the trade union or of any constituent union of the council of trade unions, as the case may be."

For ease of reference, the respondent will be referred to as "the Union", and the intervener will be referred to as "the Company".

2. The complainant is a welder who has been employed by the Company for more than nine years. His work record has not been entirely satisfactory. In the Fall of 1980, he was given a number of warnings and suspensions, of increasing length, as a result of his alleged poor workmanship. The Company suggested to him at that time that he consider a transfer to a more suitable job, but he refused to do so. A further and final incident of alleged inadequate work performance occurred on November 5, 1980. When this culminating incident was viewed

against the background of the grievor's previous record and refusal to accept a transfer to another job, the Company reached the conclusion that he should be discharged.

3. On November 5, the complainant left work with back problems. From November 6 until the date of his termination, some four weeks later, the complainant was not at work. The propriety of that absence is not at issue here. On December 1, 1980, he was sent the following letter by registered mail:

"Mr. Patterson:

Despite prior discipline, including two recent suspensions for poor workmanship, your work performance on November 5, 1980 again was [sic] inadequate.

On that date, your task was to weld the front landing gear, and down the center of the unit in a five hour cycle period. Another man welds bumpers and pockets, while a third man welds sides and helps on pockets and Rubrail.

However, on November 5, 1980, you welded only the center and landing gear on unit #1507-1 in the five hour cycle. Not only did the other two welders complete their tasks, they had to weld the unit front for you (approximately 1/3 of your work on the unit) and still waited for you. Broken down in time, you did three hours work in five hours while the other two welders did six hours work in five hours.

As your work performance has not improved despite your previous discipline, it was our decision to terminate your employment November 6, 1980.

Since you were advised of your tenuous position if your performance did not improve, and since you have not been at work since November 5, 1980 we presume you have decided to resign and seek employment elsewhere.

All documents will be so processed and monies owing to you will be mailed promptly. Please return to the Personnel Department, your Trailmobile Identification Card.

D. S. Fischer
Plant Industrial Relations Manager"

A copy of this letter was also sent to the Union.

4. The Union and the complainant both received this termination letter on or about December 2. On December 3, the complainant and Tom Bratton, the Union plant chairman, went to the personnel office to discuss the matter with Company officials, and to try to persuade them to change their minds. They were not successful. Following the meeting, Bratton and the complainant went back to the Union office to fill out a formal grievance which was filed the next day.

5. Following the filing of the complainant's grievance, Bratton and T. Duff, another Union officer, met with management on several occasions in an effort to settle the case; but the Company remained unwilling to reinstate the complainant to his former position. Bratton raised with the complainant the possibility of reinstatement to another position, explaining that this compromise might allay the Company's concerns about his workmanship, and might prompt it to be more flexible. The complainant replied, by letter, that he was willing to accept reinstatement to another position only if his grievance proceeded to arbitration.

6. In the result, the case did proceed to arbitration. The Union advised the complainant of the uncertainties which arbitration often entails. That advice turned out to be correct.

7. The Union was not optimistic about the complainant's prospect of success. There were real problems concerning his work performance and his previous record of misconduct. The Company's use of progressive discipline (which had arguably failed to have the desired effect) made it much less likely that an arbitrator would intervene and find the complainant's termination "unjust". The complainant's seniority weighed in his favour, but his actual job performance would be difficult to defend.

8. The complainant was also concerned about his grievance and consulted his own lawyer about it. The lawyer's name, and the advice which the complainant had been given, surfaced in various conversations which he had with Union officials. Pete White, the trade union representative, who eventually argued the case, advised the complainant that if he (the complainant) wished to have his own lawyer take over carriage of the proceedings and conduct the case before the arbitrator, the Union would have no objections. The complainant declined this offer.

9. About a week before the arbitration hearing, Pat White met with the complainant to review the facts, and assess the complainant's position in light of his past record, and the testimony which he could give concerning the culminating incident on November 5. That meeting did little to dispel White's pessimism. Like Bratton, White was concerned that if the arbitrator actually considered the merits of the complainant's position, he would be unlikely to interfere with the Company's decision. This conclusion prompted White to explore alternative arguments, which would direct attention to the language of the collective agreement, and deflect the arbitrator from a consideration of the complainant's competence. White's inquiry eventually focussed on article 16 of the collective agreement which reads as follows:

"When a disciplinary notice is placed against the record of any employee, a written notice shall be given to the employee and a copy of the disciplinary notice shall be sent to the Chairman of the Committee. The duplicate copy will be signed by the employee within two(2) working days, as a receipt only. Notice of such disciplinary notice shall be given within five(5) working days after the occurrence. Refusal of the employee to sign for receipt of disciplinary notice shall disqualify the employee from proceeding under the grievance procedure against any disciplinary action the Company may take. The Company agrees to remove any disciplinary notice from an employee's record nine (9) months after the giving of such disciplinary notice. Suspensions will be removed from an employee's record after one (1) year from the date the suspensions was served."

The clause respecting discharge provides:

“7.01 Whenever an employee is discharge, [sic] he will be given an opportunity of interviewing his Committeeman or Shop Committee Chairman before he is required to leave the Plant, provided that if because of the nature of the offence it is necessary to require the immediate expulsion of an employee from the plant, then his Shop Committee Chairman will be immediately notified and he will be given an opportunity to interview the discharge [sic] employee at some convenient location.

7.02 Should the employee protest his discharge as a grievance, a meeting of the Plant Committee Chairman and one Committeeman and the Industrial Relations Manager will be held within three (3) working days of his discharge to consider such discharge. In the event that any employee's complaint is found to be justified, he shall be reinstated in his former job and shall be reimbursed for all time lost, less any wages earned in other employment, or U.I.C. benefits while under dismissal or suspension. However, the parties may agree on any suitable arrangement deemed just and equitable under the circumstances.

7.03 Should the employee not be reinstated at this meeting, the written grievance may then be made subject to arbitration, provided the Company is notified in writing within fifteen (15) working days after its written disposition. If the Company is not notified within such fifteen (15) working days, then the grievance shall no longer be made subject to arbitration.”

10. Two or three days before the arbitration hearing, White telephone Bratton and advised him that he proposed to refer to *re U.A.W. and Massey Ferguson Industries Ltd. et al.* [1979] 23 O.R. (2nd) 56, and argue that article 16 was a mandatory condition precedent to a valid discharge which has not been followed in the complainant's case. Bratton was unimpressed. As a member of the bargaining committee, he knew (and candidly told this Board) that article 16 was never intended to have that effect, or apply to cases such as the complainant's. The Union had never taken that position at the bargaining table or in previous discharge grievances. In Bratton's view, a close reading of article 16, and a comparison with article 7, would simply not support White's proposed argument; moreover, both the complainant and the Union had received a form of notice. Nevertheless, Bratton did not object to the argument being made. From his point of view, there was little to lose except the cost (approximately \$1000.00) of a hearing day should the arbitrator reserve on the preliminary objection, ultimately reject it, and decide to reconvene on another day to hear the merits of the case. Employers frequently raised preliminary “technical” objections to arbitrability, and Bratton saw no reason why the Union should not assert a technical objection where it might assist its case.

11. For his part, White was well aware of the limitations of the argument. The facts and the contractual language were different from those in *Massey Ferguson*; and, in particular, the contract did not contain the imperative word “must” which had figured so prominently in the reasoning of Reid J. in the Divisional Court. Nevertheless, White too thought there was little

to risk in raising it. A letter stating his intention to do so was delivered to the Company the day before the hearing.

12. The arbitrator's award was surprising and distressing to all of the parties involved. The arbitrator held that article 16 applied to the complainant's discharge, and that proper notice was a mandatory condition precedent to a valid termination. Strict compliance was essential so that the trade union could promptly investigate the circumstances of each case. A failure to comply with the notice requirements in article 16 rendered the discharge a nullity; moreover, the notice requirement was of such fundamental character that it could not be waived. In the arbitrator's view, the case was indistinguishable from *Massey Ferguson, supra*. In the result however, he reinstated the grievor *without compensation* (the equivalent of a six month suspension without pay) because the union had failed to notify the Company of its intention to raise this preliminary issue until the day before the hearing. The arbitrator seems to have assumed that if the matter had been raised, the Company would settled the case.

13. The correctness of the arbitrator's decision is not material to the issues before this Board; however, on the basis of the evidence before me, two observations might be made. First, the form and timing of the notice of discharge did not in fact prejudice the Union in the investigation of the complainant's case. Second, even if the union had given a timely notice of its intention to argue the application of section 16, the Company would not have settled the grievance. David Fisher, the Company's industrial manager, testified that he could not foresee any circumstances in which the Company would have reinstated the complainant. Had the Company known in advance that the Union would rely on article 16, it would still have proceeded to arbitration and argued, as it eventually did, that that provision could not affect the complainant's discharge. In the Company's view, article 16 was never intended to apply to cases such as the complainant's, the provision was not intended to have the result suggested by the arbitrator, there had been adequate notice in fact, and any objections the Union might have taken at the outset had been waived.

14. Both the Union and the Company were unhappy with the arbitrator's decision. Both thought the decision was wrong — albeit for different reasons. The Company thought that the arbitrator had erred in his interpretation of the agreement. The Union thought that he had erred in his determination of the appropriate remedy. The grievor, of course, was puzzled as to why his discharge was improper, but yet he was penalized several thousand dollars in lost wages.

15. Both the Company and the Union considered judicial review. The Company decided against it because the decision was not binding on any future arbitration case, and, if necessary, the issue could be resolved at the bargaining table. The Union rejected judicial review because it was doubtful whether a Court would interfere with the exercise of an arbitrator's remedial jurisdiction. Moreover, the grievor's job had been preserved — a result which might not have obtained had his case been considered on the merits. For these reasons, both parties were content to let the decision stand.

16. There is no evidence of discrimination or bad faith in the Union's handling of the complainant's grievance. Thus if he is to establish a breach of section 68, he must demonstrate that the Union's conduct was "arbitrary".

17. The complainant contends that the Union made a "mistake" in not raising the

timeliness argument earlier, and that this “mistake” prompted the arbitrator to deny him his back wages. The mistake, the complainant argues, constitutes “arbitrary conduct” within the meaning of section 68. The complainant contends that the Union should compensate him for all of the wages lost between the time he was prepared to return to work and the date on which the arbitrator’s decision was released.

18. I am satisfied that there was nothing arbitrary in the manner in which the complainant’s grievance was processed. On the contrary, the evidence amply demonstrates that the Union did everything it could to help the complainant. The Union recognized that his job was at stake and still proceeded to arbitration with a case which it believed to be a weak one. Indeed, it was the very weakness of the complainant’s position on the merits which prompted Union officials to look for a “technical” argument which could be made in his favour. That argument, centering on article 16 and the effect *Massey Ferguson* only surfaced shortly before the arbitration hearing when Pete White, the international representative, became involved and began to prepare for the hearing. In consequence, it could not have been raised earlier; nor was there any reason in the circumstances why the Local Union officials should have hit upon it before. No doubt, had the argument been developed and raised earlier, the arbitrator might have reached a different result; however, I do not think that the Union’s handling of the case can be characterized as “arbitrary” and a breach of section 68 of the *Labour Relations Act*.

19. The complaint is therefore dismissed.

1392-81-R; 1427-81-R United Brotherhood of Carpenters and Joiners of America Local 785, (Applicant, v. **Watcon Inc.**, Respondent, v. Group of Employees, Objectors; Labourers' International Union of North America Local 1081, Applicant, v. **Watcon Inc.**, Respondent, v. Group of Employees, Objectors.

Bargaining Unit – Certification – Construction Industry – Employee – Carpenters' and Labourers' unions filing applications for respective crafts – Whether employees engaging in both crafts may be included in employee lists for both applications – Union seeking exclusion of individual as managerial – Whether Board directing examination of all persons having similar functions

BEFORE; Ian Springate, Vice-Chairman, and Board Members W. Gibson and C. A. Ballentine.

DECISION OF THE BOARD; December 18, 1981

1. These are two applications for certification in which the Board issued an earlier decision on November 19, 1981. In its November 19th decision, the Board appointed an Officer to inquire into the composition of the bargaining unit and the list of employees with respect to both applications.

2. File No. 1427-81-R involves an application for certification by Labourers' International Union of North America, Local 1081 ("Labourers Local 1081"). No hearing has as yet been held with respect to the application. By letter dated December 4, 1981, counsel for the respondent requested information "as to the present status" of certain statements of desire filed in opposition to the application by a group of objecting employees. The group of objecting employees are, of course, entitled to participate fully in the proceedings as a separate party. As to whether the statements of desire might be relevant to the question of whether the Board should exercise its discretion under section 7(2) of the Act to direct the taking of a representation vote, that it is a matter which must await a resolution as to the proper list of bargaining unit employees, and a determination as to the number of bargaining unit employees who were members of the union on October 9, 1981, the terminal date fixed for this application.

3. File No. 1392-81-R involves an application for certification by United Brotherhood of Carpenters and Joiners of America, Local 785 ("Carpenters Local 785"). By letter dated December 4, 1981, counsel for the respondent set out the following submissions:

On Wednesday, December 2, 1981 the parties held their first examination meeting pursuant to the Board's decision of November 19, 1981 with the Labour Relations Officer so appointed. At this meeting, the Union repeated its position taken earlier at the Labour Board hearing that Mr. Brian Lang, listed on the Respondent's Schedule A, should be excluded from the bargaining unit as he is a managerial employee. the Respondent argued if Mr. Lang is a managerial employee and thereby excluded from the bargaining unit, then three other persons listed on Schedule A should also be excluded on the same basis: James Harnack, Dennis Kuepfer, and Pascal Perry. The Respondent therefore requested

the Labour Relations Officer to examine these three persons in addition to Mr. Brian Lang so that the final appropriate composition of the bargaining unit could be determined.

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The Respondent would raise the following arguments in support of its position that these three persons should also be examined:

1. The Board has the initial responsibility to determine an appropriate bargaining unit. The Board would not want to include persons who should be excluded as managerial, in this bargaining unit. The Board may be critical of the Respondent for having included these four persons on its Schedule A. The Respondent would respectfully ask the Board to bear in mind the unique situation which exists in the construction industry, wherein certain foremen are historically included in the bargaining unit, while other foremen are not included in the bargaining unit. This line is not an easy one to draw. In this case, the applicant Union has taken the position that Brian Lang is a managerial employee and should be excluded from the bargaining unit. The Respondent must advise the Board that the three persons it has requested the Officer to examine would have identical or greater managerial and supervisory responsibilities with Mr. Brian Land.

4. The respondent originally included the names of Messrs. Lang, Harnack, Kuepfer and Perry on the list of employees. In our view, it is generally not open to an employer to contend after a hearing that persons it included on the list of employees should not have been included. For the purposes of this decision, however, we will assume that the respondent's position is correct, and that if Mr. Lang's name is to be removed from the list of employees so should the names of other persons who have identical or greater managerial and supervisory responsibilities. It appears to us, even on the basis of this assumption, that the question of whether Messrs. Harnack, Kuepfer and Perry actually exercise "identical or greater managerial and supervisory responsibilities" than Mr. Lang, is a relevant consideration only if the Board concludes that at the time of the filing of the application Mr. Lang did exercise managerial functions and hence should not have been included on the list of employees. In these circumstances, we are of the view that at this time Messrs. Harnack, Kuepfer and Perry should not be examined by the Labour Relations Officer, but instead the issue of the status of these three persons should (subject to the matters raised in paragraph 8 below) await the Board's decision with respect to the alleged managerial status of Mr. Lang.

5. As indicated above, in its decision of November 19, 1981, the Board appointed an Officer to inquire into the list and composition of both a bargaining unit of construction labourers, and a bargaining unit of carpenters and carpenters' apprentices. One of the reasons for this appointment was the fact that a number of individuals who appear as carpenters on the list of employees filed by the respondent in File No. 1392-81-R, also appear on the list of employees in File No. 1427-81-R as labourers. The impression we received at the hearing held with respect to File No. 1392-81-R was that the individuals in question were at times assigned labouring functions and at other times carpentry duties, and that the respondent had been uncertain as to how they should properly be classified. Counsel for Carpenters Local 785, by

letter dated December 7, 1981, has indicated that the parties are in agreement that one of these persons was employed as a carpenter on the date Carpenters Local 785 applied for certification, namely, September 25, 1981, but that he was employed as a construction labourer on September 30, 1981 when Labourers Local 1081 applied to be certified.

6. As a general principle, in the construction industry it is the Board's practice where employees are engaged in the work of different crafts or classifications, and are paid only one rate, to characterize the craft or classification in which they are employed for a majority of their time as the one governing their status on an application for certification. Further, in seeking to determine the craft or classification in which an employee was employed for a majority of the time, the Board looks not simply to the actual date of the making of the application, but rather to a period of time leading up to the date of the application. See: *J. & M. Chartrand Realty Limited*, [1978] OLRB Rep. May 423, where the Board took into account a two week time period. This approach on the part of the Board, along with the submissions of the parties at the hearing and the fact that the two application dates were only five days apart, led the Board to the conclusion that it was unlikely that the same individuals would have properly been included on both the list of carpenters and the list of construction labourers.

7. Notwithstanding the above, it is possible that a persons who was employed primarily as a carpenter might at some point in time have been "re-classified" and thereafter employed primarily as a construction labourer. If the parties are in agreement that one or more employees who were included on both lists of employees filed by the respondent fit within this category, and were employed in the carpenters' bargaining unit on September 25, 1981 and in the construction labourers' unit on September 30, 1981, the Board will accept their agreement and conclude that the individuals involved were properly included on both lists. Accordingly, there is no need for the Labour Relations Officer to inquire into the status of persons agreed by the parties to be properly included on both lists.

8. In his letter of December 7, 1981, counsel for Carpenters Local 785 made the following submission with respect to the application in File No. 1392-81-R:

... since the Applicant's challenges cannot affect its membership position and since there is no challenge to the person referred to in paragraph 17 of the Board's decision, the Applicant requests that a certificate should be issued in this matter without the necessity of examinations.

If in light of this decision, and the positions taken by the parties with respect to the status of the various individuals on the lists of employees filed by the respondent, it appears to the Labour Relations Officer that any remaining disputes between the parties as to the proper list of employees cannot affect the right of Carpenters Local 785 to be certified, the Officer is not to continue his inquiry into the list and composition of the bargaining unit in File No. 1392-81-R, but instead is to proceed only with respect to File No. 1427-81-R. In such a situation the Board will receive written submissions from the parties on the question of whether any useful purpose is now likely to be served by determining which individuals were employed within the carpenters' bargaining unit back on September 25, 1981, the date of the filing of the relevant application.

1900-80-M The Wellesley Hospital, Applicant, v. Service Employees' Union, Local 204, Respondent.

Employee Reference – Practice and Procedure – Whether secretary to chief physician and medical secretaries excluded as confidential employees – Whether reference precluded in view of prior agreement of parties – Whether access to budget information sufficient for exclusion

BEFORE: N. B. Satterfield, Vice-Chairman and Board Members J. D. Bell and O. Hodges.

APPEARANCES: *W. J. Hayter, Paul Singer and Manu Malkani for the applicant; C. A. Mitchell and Alan Edge for the respondent.*

DECISION OF THE BOARD; December 9, 1981

1. This is an application under section 106(2) [formerly section 95(2)] of the *Labour Relations Act* in which the Board is requested to determine whether three medical secretaries employed by the applicant, the Wellesley Hospital ("the hospital") are employees within the meaning of the Act. A Board Officer has inquired into the duties and responsibilities of the three persons and reported to the Board thereon. Copies of the Officer's report were given to the parties, in accordance with the Board's customary practice and the parties have made their submissions on the conclusions which the Board should reach from the report at a hearing which was scheduled for that purpose.

2. The three persons are Mrs. J. Sinton, Mrs. L. Byrne and Mrs. V. Besteman. All three are medical secretaries to doctors who are members of the hospital's board of directors and in that capacity are persons who are employed in a confidential capacity in matters relating to labour relations and, therefore, the hospital contends that they are not employees within the meaning of section 1(3)(b) of the Act. The hospital seeks to have Besteman excluded on the additional claim that she is employed in a confidential capacity in matters relating to labour relations as a consequence of her position as secretary to the hospital's physician-in-chief.

3. The question of the status of each of these three persons arose in the course of bargaining for a renewal of the collective agreement between the parties. The respondent trade union ("the union") asks the Board to dismiss the application in respect of the secretary to the hospital's physician-in-chief on the grounds that the status of that position was determined when the parties agreed during the course of the 1978 negotiations that it was to be included in the bargaining unit. Counsel for the union argued that, since there had been no change in the position of secretary to the physician-in-chief, the Board should not entertain this aspect of the application in accordance with Board policy as expressed in its decisions dealing with applications under this section. Counsel for the hospital argued, in part, that, even if union counsel was correct in his view of Board policy, there had been confusion as to which job of secretary was to be excluded from the unit and which job of secretary was to be included in it. Therefore the Board should hear and determine this element of the application.

4. The Board's policy as to when it would accept applications under section 106(2) of the Act was recently reviewed in *Westmount Hospital*, [1980] OLRB Rep. Oct. 1572 at para. 4, the relevant part of which is set out below:

“... Where parties have by virtue of their collective agreement or other form of agreement settled upon the employment status of a person, the Board at one time refused to let either party at any time withdrawn unilaterally from that agreement by means of an application under section 95(2) of the Act. (See, for example, *Belleville General Hospital*, [1975] OLRB Rep. June 487.) The basis for this policy is that a party having entered into an agreement on the status of a particular person, cannot, in the absence of a material change in duties and responsibilities, come before the Board and claim that a “question” exists as to the status of that person. *More recently, the Board has liberalized this policy so as to permit an application to be brought during negotiations for the renewal of a collective agreement, after the collective agreement has expired. Parties therefore are no longer bound indefinitely to the terms of an initial agreement. The Board will not however, permit an application (other than one relating to changes in the duties and responsibilities) to be brought during the first set of negotiations following agreement upon the status of the person in question (Collingwood General Marine Hospital, [1975] OLRB Rep. Jan. 18).* Nor will it permit a full application to be brought during the term of a collective agreement, unless it is satisfied either that the position is a new one arising during the term of the collective agreement, or that the applicant prior to entering into the collective agreement expressly reserved its right to bring a subsequent section 92(2) application on the person in dispute. Otherwise the applicant will be taken to have acquiesced in the position of the other party, and to have accepted it at least for the term of that collective agreement. The Board upon receipt of an application under section 95(2) during the term of a collective agreement therefore automatically limits the appointment of a Board Officer in inquiring into *changes* in the duties and responsibilities since the date the agreement was entered into (e.g. *Ontario Hydro*, [1975] OLRB Rep. July 560). If the applicant feels that the appointment should not be limited to “changes”, it may write to the Board setting out its reasons, and the Board may hold a hearing to deal with the proper terms of the appointment.”

(emphasis added)

5. The Examiner’s report contains the evidence of Mr. Alan Edge, business agent for the union and Mr. Manu Malkani, the hospital’s assistant administrator for medical services, concerning the events related to the 1975 and 1978 negotiations. Edge was present during both the 1975 and 1978 negotiations. Counsel for the union objected to the Board giving any weight to Malkani’s evidence and asked the Board to discount it altogether on the grounds that it was hearsay. The Board is satisfied that, while some of his evidence was in the nature of hearsay, much of it arose out of steps which he had taken shortly after his appointment as assistant administrator in order to inform himself as to the status with respect to the bargaining unit of the secretary to the chairman of the medical advisory committee and the secretary to the physician-in-chief. His evidence in that respect is worthy of consideration by the Board, but, since he was not present during the negotiations, the Board will give no weight to his evidence in the report, if any, about what took place during the bargaining sessions. Having regard to the foregoing, the evidence of Edge and Malkani reveals that the first collective agreement

between the hospital and the union was reached in 1975 following certification by the Board. That agreement was followed by one for the term October 1st, 1978 to September 30th, 1980. Prior to or around the time that the first collective agreement was reached, the parties resolved certain issues arising out of the certification. Part of that resolution was an agreement that the position of secretary to the physician-in-chief be excluded from the bargaining unit as long as there was only one such position in the hospital. Accordingly, that position was excluded from the 1975 collective agreement. The union's proposals for the 1978 negotiations contained a request that the position of secretary to the physician-in-chief be included in the unit now that it was no longer held by the employee who occupied the position at the time it was excluded from the first agreement. During the course of the bargaining, it was ultimately agreed to include the position in the bargaining unit and to exclude the position of secretary to the chairman of the medical advisory committee. The bargaining unit described in Article 2 — Recognition — of the collective agreement which expired September 30th, 1980 shows this latter position as one of the exclusions from the unit. According to Malkani, the position of secretary to the physician-in-chief was excluded from the bargaining unit in the first agreement because the physician-in-chief was a member of the board of directors and his secretary had access to confidential information. Malkani testified that it had been the hospital's intention all along to exclude the secretary to the chairman of the medical advisory committee for the same reason. His testimony confirms that, as things now stand, the secretary to the chairman of the medical advisory committee is excluded from the bargaining unit and the secretary to the physician-in-chief is included in it.

6. From that history of the bargaining it may be seen that the hospital has raised the status of the secretary to the physician-in-chief in the negotiations next following on those when its status was last settled by agreement of the parties. Those are precisely the circumstances referred to in the emphasized passage in the Board's decision in *Westmount Hospital, supra*, as usually causing the Board to refuse to entertain an application to determine the status of an employee. The Board finds nothing in the evidence of either Edge or Malkani which is indicative of any confusion of the parties over what position was to be excluded from the bargaining unit and therefore finds no basis for the grounds put forward by counsel for the hospital for the Board not to follow its policy in these matters. In the result, this application insofar as it pertains to the duties of Mrs. Besteman as secretary to the physician-in-chief is dismissed. This decision, however, does not affect the application as it relates to her duties to the physician-in-chief in his role as a member of the hospital's board of directors.

7. It remains, therefore, for the Board to determine the status of the three medical secretaries on the basis of their positions as secretaries to doctors who are members of the hospital's board of directors. Mrs. Sinton is secretary to Dr. H. A. Smythe, head of the hospital's rheumatic diseases unit. He is president of the medical staff association and because of that office is also a member of the hospital's board of directors. Mrs. Byrne is secretary to Dr. J. T. Rankin, head of the hospital's urology department, vice-president of the medical staff association and, as a consequence of that position, a member of the hospital's board of directors. Mrs. Besteman is secretary to Dr. Robert Volpe, physician-in-chief of the hospital. All three doctors are members of the hospital's medical advisory committee and Dr. Volpe is its vice-chairman and, as such he is also a member of the hospital's board of directors.

8. The hospital is a teaching hospital associated with the faculty of medicine of the University of Toronto. The doctors who provide service at the hospital are not employees of the hospital, the majority of them being employees of the University of Toronto Faculty of

Medicine. They have admitting privileges at the hospital and they provide medical care for its patients, teach resident doctors at the hospital and students at the University of Toronto, carry out administrative duties for the hospital in connection with their medical services function and carry on the private practice of medicine. These conditions apply to the three doctors for whom the secretaries work.

9. The medical secretaries in question here are employees of the hospital and at the time the question of their status arose, were employees in the bargaining unit for whom the union is the bargaining agent. It is common ground between the parties that, if the three doctors for whom the secretaries now work are replaced by other doctors in their positions which are the reason for them being members of the board of directors, the secretaries of the replacing doctors would come with them. Therefore the three persons whose status is now in question would ordinarily cease to be secretaries to members of the board of directors.

10. Each of the three secretaries' duties and responsibilities reflect the work which is required of them by the mix of work performed by the doctors to whom they are assigned. The facts with which the Board is concerned are those which relate solely to the duties associated with the doctors' roles as members of the hospital's board of directors. Except where specifically noted otherwise, the facts set out hereunder apply to all three secretaries. There is nothing in the evidence about their duties connected with the doctors' functions at the hospital other than as members of its board of directors that has any potential for a conflict of interest in respect of the labour relations of the hospital. There is evidence that two of the secretaries deal with information relating to the appointment, promotion and remuneration of medical staff (doctors) of the hospital. Since these doctors are not employees of the hospital, these duties of the secretary pose no conflict of interest in respect of the hospital's labour relations and, therefore, will be given no weight by the Board in determining the status of these employees. See the Board's decision in *Comtech Group Limited*, [1974] OLRB Rep. May 291. The facts in respect of the duties of the secretaries associated with the doctors' as members of the board of directors are set out hereunder.

11. Much of the evidence about the activities of the hospital's board of directors and the matters with which it deals is from Malkani's testimony. He is not a member of the board or any of its committees, but he is responsible to the executive director who is a member of board, the medical advisory committee and the finance committee. Malkani does not routinely receive minutes of the meetings of the board or its committees, although he has access to them through the executive director when his job requires that he makes reference to these minutes and he has in fact done so. While his evidence about the board and its committees is in the nature of hearsay, the Board is satisfied that his knowledge of these matters arises from the requirements of his job. His testimony within that scope of knowledge indicates that the matters with which the Board deals as the governing body of the hospital include:

- (a) the negotiations with the various unions at the hospital, including the anticipated results of those negotiations;
- (b) making the final decisions on the hospital's funding, including funding related to staff costs;
- (c) final approval of the operating expense budgets for the hospital and its major departments;

- (d) determination of what funds are to be made available for salaries and wages; and
- (e) final decisions on steps to be taken for dealing with shortfalls with the hospital's funding.

12. When the Board is dealing with problems of shortfalls in the hospital's funding, it gets input in terms of alternate plans from the responsible staff in its various divisions. These plans are reviewed by the medical advisory committee which advises the Board on the impact which each plan will have on medical care. The Board then decides which plan, if any, it will implement. Its decision is reflected in the minutes of its meetings. Before the Board gives final approval to the hospital's operating expense budgets, these budgets have been screened by its finance committee. These budgets include estimates of the salary and wage cost and the impact of expected salary and wage settlements based on the best estimate available at the time the budget is prepared. The budget proposals contain estimates as to staffing levels. During the course of negotiations, the estimate of the per cent increase in salary and wage costs affected by the negotiations are revised. While the estimated percentage increase is minuted by the Board, there is no evidence that the estimates of staffing levels gets into the minutes of the Board or its finance committee. There is no documentary evidence before the Board as to the specific contents of minutes of the board of director's meetings. There is documentary evidence of the minutes of a meeting of the finance committee and these contain a general reference to a pending settlement in respect of union negotiations and to the fact that the hospital's budget contains an average increase of $8\frac{1}{2}$ percent in salary costs, while the anticipated "salary award" is estimated to be 12 per cent, creating a potential budget shortfall of \$220,000.00 to \$250,000.00.

13. As noted above, minutes of the meetings of the board of directors are circulated to all of its members, together with the minutes of meetings of any of the board committees. The evidence indicates that, from time to time, the financial statements of the hospital are included as well. The three secretaries receive these minutes in envelopes addressed to their respective doctors and marked confidential. They open the envelopes and give the minutes to the doctors. Except for Mrs. Sinton, they are responsible for filing them. All three have unrestricted access to the minutes. While Mrs. Besteman's job description requires her to read the minutes, her evidence is that she does not read them unless Dr. Volpe asks her for some specific information. Mrs. Sinton does not read the minutes at all and Mrs. Byrne stated that it was not part of her job to read them, but she may scan the first page or two to check for dates of future meetings before turning the minutes over to Dr. Rankin. Mrs. Byrne had reviewed her file on the board of director's meetings prior to going to the examiner's meeting and, as a result, was aware that the financial statements of the hospital cross her desk. While she admitted that they may contain budget information in respect of the general staffing levels in the hospital, she was unable to recall whether the most recent budget contained a reference from the board of directors as to the need to reduce the expense budget. The three doctors for whom they work play no role in respect of the hospital's collective bargaining activity, including the negotiation of its collective agreements or the administration of those agreements. If they have any role at all, it is limited to participating in any discussions which the board of directors might have pertaining to negotiations. None of the secretaries have been asked to prepare for their doctors, any memoranda, reports or other documents which deal with the hospital's labour relations.

14. The purpose of the provisions in section 1(3)(b) of the Act which deal with persons employed in a confidential capacity in matters relating to labour relations is to protect employers from the potentially adverse effects of the disclosure of such matters. In a similar way, it protects the employees who are so employed from being placed in a conflict of interest between the union which would represent them were they not excluded from the bargaining unit and the employer. The avoidance of such conflicts of interest is important to the effectiveness of the collective bargaining relationship. The Board has consistently followed the criteria referred to in its decision in *Falconbridge Nickel Mines Limited*, [1966] OLRB Rep. Sept. 379 which are most often quoted as being "... a regular, material involvement in matters relating to labour relations. ...". That decision also states that "... the degree of involvement and the extent of the confidential nature of the matters dealt with become important factors to be considered in determining exclusions under these provisions [of section 1(3)(b) of the Act]".

15. Counsel for the hospital recommended to the Board as an example of the application of these criteria, the Board's decision in *RCA Limited*, [1980] OLRB Rep. Sept. 1316. In that case the Board found that the secretary to the manager of financial operations and the secretary to the manager of quality and reliability were not employees within the meaning of section 1(3)(b) of the Act on the basis of their regular and material involvement with "... sensitive information going to the heart of the bargaining strategy and goals of the company.". As a result of this finding, the Board excluded them from a bargaining unit of office, clerical and technical employees. The Board reached this conclusion from the fact that the two employees typed "... financial reports and budget material which contain statements of the amount budgeted for future clerical salaries. Although these amounts are stated in the form of an overall figure, percentages can be easily deduced from them.". They were two of five secretaries whose status the Board was considering. The three other secretaries were not excluded from the bargaining unit since the Board found that they did not have regular and material access to the same kind of sensitive material.

16. Before coming to both of these conclusions, the Board had considered the following circumstances.

"The issue respecting the above individuals is whether they handle information which would place them in a position of conflict of interest as between their employer and the union. The evidence establishes that all of these individuals type and handle documents in the nature of business planning statements. These include periodic profit and loss statements, statements of departmental expenses, the company's estimate requests or appropriations requests, and forcecasts of production schedules. Handling such documents and information does not itself make these individuals confidential in respect of labour relations matters. Some of the documents the secretaries handle are more detailed than others; some are extremely general. In each case the Board must determine whether the information handled by the individual secretary is sufficiently particular in respect of material labour relations information such as projected hirings, lay-offs or wages as to raise the likelihood of a genuine conflict of interest."

In the case at hand, the only involvement of the three secretaries is in the limited handling of the minutes of the board of director's meetings and the other documents related thereto. They

perform no other tasks than the receiving of these documents and the custody of them, except for an extremely limited reading reference in the case of Mrs. Besteman and Mrs. Byrne. The facts of this case readily distinguish it from *RCA Limited, supra*, as they do from the Board's decision in *Simmons Limited*, [1980] OLRB Rep. May 787, another case on which counsel for the hospital relied. In that case the only secretary to the general manager and assistant general manager handled a wide range of duties which involved her in working with and typing information which was confidential in respect of labour relations.

17. On the evidence before the Board that the three secretaries simply have access to the information which flows from the minutes of the board of director's meetings, their exposure to material which might be sensitive to the hospital's labour relations is far too remote to be termed a regular and material involvement. The Board finds, therefore, that they are not employed in a confidential capacity in matters relating to labour relations and therefore are not excluded from the bargaining unit.

1577-81-U Westeel Rosco Limited, Applicant, v. United Steelworkers of America and its Local 6448, John Fitzpatrick and Richard Vaughan, Respondents

Strike – Union refusing overtime assignments in support of strike at company's sister-plant – Concerted refusal to do excess overtime under permit of Employment Standards Director – Whether unlawful strike – Board issuing declaration

BEFORE: E.N. Davis, Vice-Chairman.

DECISION OF THE BOARD; December 16, 1981

1. This is an application made under section 92 of the Act alleging that the respondents did on October 19, 1981, call or authorize an unlawful strike by the employees of the applicant employed in Metropolitan Toronto.

2. At the hearing into the matter on October 26, 1981, the Board issued an oral decision declaring that the respondents, United Steelworkers of America and its Local 6448 did call or authorize an unlawful strike within the meaning of section 92 of the Act and issued a cease and desist order. The Board undertook to provide written reasons for its decision and such are provided herein.

3. The applicant operates four plants in the Rexdale area of Metropolitan Toronto and one plant in Burlington, Ontario, all of which are covered by the same collective agreement between United Steelworkers of America and the applicant and which agreement continues in effect until June 13, 1982. There is no dispute that Local 6448 of the United Steelworkers of America is comprised solely of employees of the applicant.

4. As a result of rumours heard in the morning of October 26, to the effect that the Local intended to refuse overtime assignments, Mr. Robert Mitchell, Senior Plant Manager

for the five plants, asked Mr. Vaughan, President of the Local and an employee of the applicant, at the close of a previously arranged meeting that afternoon about the matter. Vaughan informed Mitchell that the official position of the Union was that a membership meeting of the previous night had voted not to participate in any overtime in Rexdale until the Stran Steel situation was settled. It should be noted that Stran Steel is a sister corporation of the applicant whose employees are represented by the United Steelworkers of America. Those employees are currently engaged in a lawful strike, and it was Mitchell's understanding that a Mr. Fitzpatrick, an International Representative was participating in the Stran Steel negotiations and, according to Vaughan, attended the Local 6448 meeting of the previous night.

5. Mr. Dante Cavassi, Plant Manager at the Westeel Plant No. 72, testified that on October 15, 1981, he prepared a handwritten list of bargaining unit and non-bargaining unit employees who had volunteered for overtime work on Saturday, October 24 to complete an annual inventory. Cavassi was informed by Mitchell on October 20 that rumours of overtime refusal appeared to be accurate and, was requested by Mitchell to again solicit the employees on his list to work on October 24. Cavassi recanvassed all the previous volunteers who then refused the assignment. Cavassi then canvassed the remaining bargaining unit employees and met with similar refusals. No reason was given for the refusal by any individual employee and no reason was sought by Cavassi, which is in accord with Cavassi's normal practice. No bargaining unit employees did work on October 24 and the inventory was completed by employees from outside the unit. Cavassi stated that overtime demands were erratic dependent on customer demands and, to some extent seasonal, and that over the past two years he had no difficulty in securing employees to fill requirements.

6. Mr. Edward Sherman is Plant Manager of Plant 26 at which location the annual inventory was scheduled to be completed on Friday, October 23. On October 22, Sherman was holding an employee meeting to renew inventory methods and procedures when he was interrupted by his supervisor and informed that it had been determined that a job shipped the previous week had been poorly designed and that it would be necessary to produce re-designed units. While there were a total of sixty units involved, it was said that ten were required for the following day. It was estimated that the job would take two men some three-hours to do. Sherman was asked to get two key people to stay on overtime to produce the ten new units. Sherman approached two employees who were classified as Culvert Machine Operators to do this work and they both refused, without reason given or asked. Sherman stated that the work was not done that night and couldn't be done on the succeeding day because of inventory. Sherman acknowledged that there was then a Culvert Machine Operator on lay-off and that he did not call on that employee as it was not a usual practice, and that it was not usual for production to be carried on concurrent with inventory-taking.

7. The applicant employer was possessed of a permit issued by the Director of Employment Standards pursuant to section 20 of that statute permitting work in excess of the statutory daily and weekly maximum hours. It was not disputed that the hours scheduled for October 24 were within the statutory weekly maximum.

8. No witnesses were called to give evidence on behalf of the respondents.

9. The Board found that the action of the respondent Union on October 19 constituted a calling or authorizing of an unlawful strike. Counsel for the Union argued that the *Employment Standards Act*, in authorizing hours in excess of those stipulated in section 17 of

that Act conferred a right on the employee or his agent to refuse an assignment beyond his regular hours of work and that it was immaterial whether the right was exercised individually or in concert. It was argued that the right under the *Employment Standards Act* shall be viewed as taking the complained of activity out of the general prohibition of the *Labour Relations Act*. Whatever force should be given to that argument in respect to employer demands for work in excess of eight hours in a day, it is clear that in respect to the scheduling of hours within permitted statutory maximums such as on Saturday, October 24, 1981, the argument has no application. The defence argued by the Union must, at its highest, be limited to those hours in excess of permitted hours under section 17 of the *Employment Standards Act* and is no defence to calling or authorizing a concerted refusal to work hours within the statutory maximum. The Union in calling for a general refusal of overtime did not differentiate between overtime hours which required the issuance of a permit by the Director of Employment Standards and those hours which did not and, the call was obviously intended to catch both as in fact it did. By so doing, the Union was acting in contravention of section 74 of the *Labour Relations Act*, at least insofar as the refusal of work on October 24 was concerned, and the employees refusing such assignment in concert were engaged in an unlawful strike.

10. The relevant sections of the *Labour Relations Act* to be considered are sections 1(1)(o) and 74.

Section 1(1)(o) of the Act defines "strike" as:

"1(1) In this Act, ...

"strike" includes a cessation of work, a refusal to work or to continue to work by employees in combination or in concert or in accordance with a common understanding, or a slow-down or other concerted activity on the part of employees designed to restrict or limit output."

Section 74 of the Act reads:

"No trade union or council of trade unions shall call or authorize or threaten to call or authorize an unlawful strike and no officer, official or agent of a trade union or council of trade unions shall counsel, procure, support or encourage an unlawful strike or threaten an unlawful strike."

11. The question posed by the Union's argument insofar as refusal of overtime assignments involving hours in excess of the statutory maximums is whether, by virtue of sections 17 and 20 of the *Employment Standards Act*, the Union has the right, as the statutory agent of employees, to direct or encourage concerted action to refuse overtime work which is in excess of the statutory maximum and covered by permit issued by the Director of Employment Standards, in disregard of the prohibition of such concerted activity by the *Labour Relations Act*. It is my conclusion that, in the circumstances of this case, no such right exists. In arriving at that conclusion, regard must be had for the provisions of both relevant statutes and of the collective agreement.

12. It is clear that the permissive discretion accorded to the Director of Employment Standards by the section 20 of that statute is not an employment standard such as is a "requirement in favour of an employee". This matter is well dealt with by the Board in its

decision in the case of *C & C Yachts Manufacturing Limited*, [1977] OLRB Rep. July 433, at paragraph 28, thereof in which it was said:

“The exception that allows for a permit or approval of the Director of Employment Standards for work in excess of the maximum standard is not a “requirement in favour of an employee” as that phrase is understood in the Act. Employees are fully protected by the section 17 prohibition of work in excess of eight hours in a day and forty-eight in a week. The approval or permit operates in favour of employers by allowing them to assign work in excess of the statutory maximum with the consent of their employees or their agent. The approval or permit is a saving provision to allow exceptions to the basis statutory standards where certain public policy factors outlined in the Act are found to apply. In other words, the requirement of the approval or permit is not an employment standard as defined in the Act and section 4(2) has no application to it.”

13. A basic thrust of the *Labour Relations Act* is that industrial peace will not be disrupted during the currency of a collective agreement. To that end, section 42 of the Act requires that every collective agreement shall contain, or be deemed to contain, a provision that there shall be “no strikes or lockouts and section 72 of the Act contains a prohibition against strikes or lockouts except under specified circumstances. Additionally, sections 74 and 75 of the Act set forth in clear language prohibitions on the calling or authorizing, or threatening to call or authorize, or counselling, procuring, supporting or encouraging of an unlawful strike or lockout. Having regard to the comprehensive and detailed manner in which the Legislature has directed its attention to the importance of precluding the disruption of industrial peace through strikes or lockouts, it would, in my view, require the most explicit language in some other statute to negate or over-ride that legislative intent, and I do not find such language in section 20(3) of the *Employment Standards Act*. That section reads:

“The issuance of a permit under this section does not require an employee to work any hours in excess of those prescribed by section 17 or approved under section 18 without the consent or agreement of the employee or his agent. . . .”

In my view, the purpose of the section is to ensure against the permit in itself being used as a basis on which to found mandatory or compulsory acceptance of overtime assignments, and leaves the determination of the right of the employer to demand acceptance of overtime assignments and the right of the employee to refuse overtime assignments subject to the terms and conditions of employment and other relevant statutes. The section cannot be interpreted as conferring a right on an employee or his agent to engage in activities which are otherwise specifically proscribed by the *Labour Relations Act*.

14. It is clear that insofar as the Union motion of October 19, was calling for a general refusal of overtime assignments, including those in excess of eight hours in a day, it was calling on employees to engage in concerted activity designed to restrict or limit output within the meaning of section 1(1)(o) of the Act and in contravention of section 74 of the Act.

15. For all of the foregoing reasons, the Board found that in the circumstances of this case, sections 17 and 23 of the *Employment Standards Act* did not provide a defence to the Union for a disregard of section 74 of the Act, and that it was not a case in which the Board should refuse to exercise its discretion to issue a declaration.

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APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR BOARD NOVEMBER 1981

BARGAINING AGENTS CERTIFIED

No Vote Conducted

0792-80-R: Canadian Union of Public Employees, (Applicant) v. Regency Residence, (Respondent).

Unit: "all employees of the respondent in Sudbury, Ontario, save and except Administrator, Director of Nursing, Maintenance and Services Manager, office staff, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation periods". (7 employees in unit). (*Having regard to the agreement of the parties*).

2762-80-R: United Food and Commercial Workers International Union, Local 1000A, (Applicant) v. Jack Colden Ltd., (Respondent) v. Group of Employees, (Objectors).

Unit #1: "all employees of the respondent at its store in Kingston West, save and except assistant store manager, persons, above the rank of assistant store manager, personnel manager, office staff and persons regularly employed for not more than twenty-four hours per week". (68 employees in unit). (*Having regard to the agreement of the parties*).

Unit #2: "all employees of the respondent at its store in Kingston West who are regularly employed for not more than twenty-four hours per week, save and except assistant store manager, persons above the rank of assistant store manager, personnel manager and office staff". (26 employees in unit). (*Having regard to the agreement of the parties*).

2806-80-R: Christian Labour Association of Canada, (Applicant) v. Strano Foods Limited, (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the Employer at its premises in the city of Peterborough, Ontario and in the township of North Monaghan, Ontario, save and except office staff, sales staff, supervisors and persons above the rank of supervisor". (31 employees in unit).

0089-81-R: Local 47 Sheet Metal Workers' International Association, (Applicant) v. Irvcon Roofing & Sheet Metal (Pembroke) Ltd., (Respondent).

Unit: "all journeymen sheet metal workers and registered sheet metal apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction Industry in the Province of Ontario and all journeymen sheet metal workers and registered sheet metal apprentices in the employ of the respondent in all other sectors in the County of Renfrew, save and except non-working foremen and persons above the rank of non-working foreman". (6 employees in unit).

0380-81-R: International Union of Operating Engineers, Local 793, (Applicant) v. Amherst Construction Ltd., (Respondent).

Unit: "all employees of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all employees of the respondent in all other sectors in the County of Lennox and Addington, and the County of Frontenac and the Townships of Rear of Leeds and Lansdowne, Rear of Yonge and Escott, and all lands south thereof in the United Counties of Leeds and Grenville engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank non-working foreman". (5 employees in unit).

0441-81-R: Operative Plasterers' and Cement Masons' International Association, Local 172, (Applicant) v. Clifford Masonry Limited, (Respondent) v. Labourers' International Union of North America, Local 506, (Intervener).

Unit: "all employees of the respondent engaged in restoration work in the industrial, commercial and institutional sector of the construction industry and all other sectors of the construction industry, in the Province of Ontario, save and except non-working foremen and those above the rank; and save and except those employees covered by existing collective agreements". (13 employees in unit).

0463-81-R: Canadian Union of Public Employees, (Applicant) v. Ontario Cancer Foundation, Hamilton Clinic, (Respondent) v. Group of Employees, (Objectors).

Unit: "all office and clerical employees of the respondent in the City of Hamilton save and except business office manager, full-time secretary to medical director, part-time secretary to medical director, head medical records, assistant head medical records, supervisors and persons above the rank of supervisor". (38 employees in unit). (*Having regard to the agreement of the parties*).

0543-81-R: Union of Bank Employees Local 2104 (Ontario) C.L.C., (Applicant) v. Airline (Malton) Credit Union Limited, (Respondent).

Unit: "all office, clerical and technical employees of the respondent at Malton, Ontario, save and except Manager, persons above the rank of Manager, and Steno/Receptionist". (13 employees in unit). (*Having regard to the agreement of the parties*).

1368-81-R: Ontario Public Service Employees Union, (Applicant) v. The Brant County Board of Education, (Respondent).

Unit #1: "all occasional teachers in the elementary panel employed by the respondent in the County of Brant, Ontario, save and except occasional teachers regularly employed for not more than 24 hours per week". (9 employees in unit). (*Having regard to the agreement of the parties*).

Unit #2: (*See Applications for Certification Subsequent to a Post-Hearing Vote*).

1370-81-R: London and District Service Workers' Union, Local 220, S.E.I.U., A.F.L., C.I.O., C.L.C., (Applicant) v. St. Raphael's Nursing Homes Limited, carrying on business as St. Raphael's Nursing Home (Durham), (Respondent).

Unit: "all employees of St. Raphael's Nursing Homes Limited at Durham, Ontario, regularly employed for not more than twenty-four hours per week and students employed during the school vacation period, save and except foremen, supervisors, persons above the rank of foreman and supervisor, professional nursing staff and office staff". (13 employees in unit). (*Having regard to the agreement of the parties*).

1371-81-R: London and District Service Workers' Union, Local 220, S.E.I.U., A.F.L., C.I.O., C.L.C., (Applicant) v. St. Raphael's Nursing Homes Limited, carrying on business as St. Raphael's Nursing Home (Durham), (Respondent).

Unit: "all employees of St. Raphael's Nursing Homes Limited at Durham, Ontario, save and except foremen, supervisors, persons above the rank of foreman and supervisor, professional nursing staff, office staff, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period." (14 employees in unit). (*Having regard to the agreement of the parties*).

1424-81-R: Canadian Union of Public Employees, (Applicant) v. Espanola General Hospital, (Respondent).

Unit: "all employees of the respondent at Espanola, Ontario, regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period, save and except supervisors, persons above the rank of supervisor, professional medical staff, registered, graduate and undergraduate nurses, student dietitians, undergraduate pharmacists, paramedical personnel and office and clerical staff". (6 employees in unit). (*Having regard to the agreement of the parties*).

1481-81-R; 1482-81-R: International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, Local No. B173, (Applicant) v. Ed Mirvish Enterprises Limited, carrying on business under the name of the Royal Alexandra Theatre, (Respondent).

Unit #1: “all employees of the respondent engaged in its theatre operation at the Royal Alexandra Theatre, Toronto, save and except Subscription and Box Office Managers and those above the rank of Manager, those regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period, and those covered by a subsisting collective agreement between the respondent and I.A.T.S.E., Local 58”. (19 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

Unit: #2: “all employees of the respondent engaged in its theatre operation at the Royal Alexandra Theatre, Toronto, regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period, save and except Box Office and Subscription managers and those above the rank of manager, and those covered by a subsisting collective agreement between the respondent and I.A.T.S.E., Local 58”. (6 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

1485-81-R: International Association of Machinists & Aerospace Workers, (Applicant) v. Masoneilan of Canada Ltd., (Respondent) v. Employee, (Objector).

Unit: “all employees of the respondent in the Town of Oakville, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff and students employed during the school vacation period”. (13 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

1487-81-R: Teamsters, Chauffeurs, Warehousemen and Helpers Local Union No. 91, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. Ottawa Commercial Realities Limited, (Respondent) v. Group of Employees, (Objectors).

Unit: “all employees of the respondent working at Ottawa, Ontario, save and except supervisors, those above the rank of supervisor, office and sales staff, persons regularly employed for not more than twenty-four (24) hours per week, and students employed during the school vacation period”. (17 employees in unit). (*Having regard to the agreement of the parties*).

1492-81-R: Commercial Workers Union Local 486, (Applicant) v. Hofmann Balancing Techniques Ltd., (Respondent).

Unit: “all employees of the respondent at Belleville, Ontario, save and except foremen, persons above the rank of foremen, office and sales staff”. (16 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

1498-81-R: Shopmen’s Local Union No. 834 of the International Association of Bridge, Structural and Ornamental Iron Workers, (Applicant) v. Rapistan Systems Limited, (Respondent) v. Group of Employees, (Objectors).

Unit: “all employees of the respondent at Rexdale, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff, draftsmen, engineers, time study personnel, watchmen, security guards, persons engaged in field fabrication work, employees regularly employed for not more than 24 hours per week and students employed during the school vacation period”. (56 employees in unit). (*Having regard to the agreement of the parties*).

1506-81-R: International Union of Operating Engineers, Local 793, (Applicant) v. Moretti Excavating Ltd., (Respondent).

Unit: “all employees of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all employees of the respondent in all other sectors

in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman". (3 employees in unit).

1515-81-R: London and District Service Workers' Union, Local 220 SEIU, AFL, CIO, CLC, (Applicant) v. Extendicare Ltd., (Respondent).

Unit: "all registered nurses employed by the respondent at Port Stanley, Ontario, save and except head nurse, persons above the rank of head nurse, office staff and registered nurses regularly employed for not more than 24 hours per week". (3 employees in unit). (*Having regard to the agreement of the parties*).

1518-81-R: Service Employees Union, Local 204 affiliated with A.F. of L., C.I.O., C.L.C., (Applicant) v. Baycrest Hospital and the Jewish Home for the Aged and Baycrest Terrace, (Respondent).

Unit: "all employees of Baycrest Hospital and the Jewish Home for the Aged and Baycrest Terrace in Metropolitan Toronto, regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period, save and except supervisors, persons above the rank of supervisor, professional nursing staff, paramedical employees, office staff and persons covered by subsisting collective agreements". (146 employees in unit). (*Having regard to the agreement of the parties*).

1524-81-R: Teamsters, Chemical Energy and Allied Workers Local Union 424, (Applicant) v. Canadian Admiral Corporation, Ltd., (Respondent).

Unit: "all employees of the respondent at its warehouse at 6435 Northwest Drive, Mississauga, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff, field service representatives, service technicians, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period". (28 employees in unit). (*Having regard to the agreement of the parties*).

1531-81-R: Service Employees Union, Local 204 affiliated with A.F. of L., C.I.O., C.L.C., (Applicant) v. West Park Hospital, (Respondent).

Unit: "all employees of the respondent in Metropolitan Toronto, regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period, save and except supervisors, persons above the rank of supervisor, professional medical staff, registered and graduate nurses, undergraduate nurses, undergraduate pharmacists, student dietitians, paramedical personnel, office and clerical staff, students employed in a co-operative training program and persons covered by subsisting collective agreement(s)". (23 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

1546-81-R: Commercial Workers Union Local 486, (Applicant) v. Santa Maria Foods, (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent in Belleville save and except manager, persons above the rank of manager and sales staff". (51 employees in unit).

1552-81-R: The Canadian Union of Public Employees, (Applicant) v. The St. Christopher House, (Respondent).

Unit: "all employees of the respondent in Metropolitan Toronto, save and except Directors, persons above the rank of Director, Executive Secretary, Office Manager, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period". (16 employees in unit). (*Having regard to the agreement of the parties*).

1586-81-R: International Union of Operating Engineers, Local 793, (Applicant) v. J.A. Levasseur Construction Inc., (Respondent).

Unit: “all employees of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all employees of the respondent in all other sectors in the Regional Municipality of Ottawa-Carleton and the United Counties of Prescott and Russell engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman”. (2 employees in unit).

1588-81-R: Canadian Union of Public Employees, (Applicant) v. Country Place Residence, (Respondent).

Unit: “all employees of the respondent at Richmond Hill, Ontario, save and except supervisors, persons above the rank of supervisors, personnel co-ordinator, office and clerical staff, registered, graduate and undergraduate nurses and students employed during the school vacation period”. (11 employees in unit). (*Having regard to the agreement of the parties*).

1599-81-R: International Union of Operating Engineers, Local 793, (Applicant) v. Farry Excavating & Grading Limited, (Respondent).

Unit: “all employees of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all employees of the respondent in all other sectors in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman”. (5 employees in unit).

1600-81-R: Ontario Public Service Employees Union, (Applicant) v. Oshawa/Whitby Crisis Intervention and Rehabilitation Centre carrying on business as Frontenac Youth Services, (Respondent).

Unit: “all employees of the respondent employed at Oshawa, Ontario, save and except co-ordinator and persons above the rank of co-ordinator, the executive secretary, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period”. (13 employees in unit). (*Having regard to the agreement of the parties*).

1614-81-R: International Brotherhood of Painters and Allied Trades — Local Union 1891, (Applicant) v. Johnson’s Painting Co., (Respondent).

Unit: “all painters and painters’ apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all painters and painters’ apprentices in the employ of the respondent in all other sectors in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman”. (6 employees in unit).

1642-81-R: Labourers’ International Union of North America Local 527, (Applicant) v. Dufresne Piling Company (1967) Ltd., (Respondent).

Unit: “all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all construction labourers in the employ of the respondent in all other sectors in the Regional Municipality of Ottawa-Carleton and the Counties of Prescott and Russell, save and except non-working foremen and persons above the rank of non-working foreman”. (21 employees in unit).

1643-81-R: Labourers' International Union of North America Local 527, (Applicant) v. Hawthorne Drilling Ltd., (Respondent).

Unit: "all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all construction labourers in the employ of the respondent in all other sectors in the Regional Municipality of Ottawa-Carleton and the United Counties of Prescott and Russell, save and except non-working foremen and persons above the rank of non-working foreman". (3 employees in unit).

1644-81-R: Retail, Commercial & Industrial Union, Local 206, Chartered by United Food & Commercial Workers International Union, (Applicant) v. Collegiate/ Arlington Sports, a division of The UCS Group Limited, (Respondent).

Unit: "all employees of the respondent in the Municipality of Metropolitan Toronto employed in its warehouse operations, save and except office staff, section heads, persons above the rank of section head and students employed during the school vacation period". (66 employees in unit). (*Having regard to the agreement of the parties*).

1646-81-R: Lumber and Sawmill Workers Union, Local 2995 of the United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Mike's Food Store (Hearst) Limited, (Respondent).

Unit: "all employees of the respondent at Hearst, Ontario, regularly employed for not more than 24 hours per week and students employed during the school vacation period". (13 employees in unit). (*Having regard to the agreement of the parties*).

1647-81-R: Canadian Union of Public Employees, (Applicant) v. Victoria Day Care Services, (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent in Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, family workers, infant care workers, office and clerical staff, housekeeping staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period". (16 employees in unit). (*Having regard to the agreement of the parties*).

1654-81-R: United Rubber, Cork, Linoleum and Plastic Workers of America, AFL-CIO-CLC, (Applicant) v. GTR Industrial Products Company (Canada), Welland, (Respondent).

Unit: "all office, clerical and technical employees of the respondent in Welland, Ontario, save and except supervisors of department managers and their assistants, persons above the rank of supervisor or department manager, outside, sales staff, professional engineers, industrial engineers, process engineers, compounders, confidential secretaries to members of the management committee, safety coordinator, E.D.P. and P.O.I. coordinator, analyst programmer II, programmer II, plant nurse, persons regularly employed for not more than 24 hours per week, students employed during the school vacation period, students involved in co-operative programs and persons covered by a subsisting collective agreement". (21 employees in unit). (*Having regard to the agreement of the parties*).

1663-81-R: International Printing and Graphic Communications Union, (Applicant) v. Standard-Freeholder a Division of Canadian Newspaper Company Limited, (Respondent v. Group of Employees, (Objectors).

Unit: "all employees of the respondent employed in Cornwall, Ontario, in the Advertisig Department, Clerical Department, Circulation Department, and the Business Office save and except Advertising Manager, Circulation Manager, Accountant, persons above those ranks, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period". (17 employees in unit). (*Having regard to the agreement of the parties*).

1670-81-R: Labourers' International Union of North America, Local 493, (Applicant) v. Common Construction Company Ltd., (Respondent).

Unit: “all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all construction labourers in the employ of the respondent in all other sectors within a radius of thirty-five miles from the City of Sudbury Federal Building, save and except non-working foremen and persons above the rank of non-working foreman”. (9 employees in unit).

1671-81-R: Service Employees International Union, Local 183, A.F. of L., C.I.O., C.L.C., (Applicant) v. The VanDusen Home Limited, (Respondent).

Unit #1: “all employees of the respondent in Picton, Ontario, save and except professional nursing staff, supervisors, foremen, persons above the rank of supervisor and foreman, office staff and persons regularly employed for not more than twenty-four hours per week”. (16 employees in unit).

Unit #2: “all employees of the respondent in Picton, Ontario, regularly employed for not more than twenty-four hours per week, save and except professional nursing staff, supervisors, foremen, persons above the rank of supervisor and foreman, and office staff”. (7 employees in unit).

1672-81-R: Service Employees International Union, Local 183, A.F. of L., C.I.O., C.L.C., (Applicant) v. Modern Building Cleaning, Division of Dustbane Enterprises Limited, (Respondent).

Unit: “all employees of the respondent at Sir Sandford Fleming College, Peterborough, regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except foremen and foreladies, persons above the rank of foreman and forelady, office, clerical and sales staff”. (4 employees in unit). (*Having regard to the agreement of the parties*).

1678-81-R: Communications Workers of Canada, (Applicant) v. Business Answering Service of London Limited, (Respondent).

Unit #1: “all employees of the respondent at London, Ontario, save and except supervisors, persons above the rank of supervisor, accountant, bookkeeper, salesman, secretary to the President and General Manager, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period”. (20 employees in unit). (*Having regard to the agreement of the parties*).

Unit #2: “all employees of the respondent at London, Ontario, regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except supervisors, persons above the rank of supervisor, accountant, bookkeeper, salesman and secretary to the President and General Manager”. (9 employees in unit). (*Having regard to the agreement of the parties*).

1690-81-R: Retail, Wholesale and Department Store Union, AFL:CIO:CLC, (Applicant) v. M. Loeb Limited, (Respondent).

Unit: “all employees of the respondent at its retail stores at Azilda, save and except store manager and persons above the rank of store manager”. (16 employees in unit). (*Having regard to the agreement of the parties*).

1748-81-R: The Millwright District Council of Ontario, United Brotherhood of Carpenters and Joiners of America, on behalf of Locals 1007; 1244; 1410; 1425; 1592; 1669; 1916 and 2309, (Applicant) v. Universal Erectors Ltd., (Respondent).

Unit: “all millwrights and millwrights’ apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all millwrights and millwrights’ apprentices in the employ of the respondent in all other sectors in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman”. (4 employees in unit).

1749-81-R: The Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27, 666, 681, 1133, 1747, 1963, 1304, 3227, and 3233, United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Rock Engineering Construction Ltd., (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all carpenters and carpenters' apprentices in the employ of the respondent in all other sectors in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman". (2 employees in unit).

1769-81-R: Ready-Mix, Building Supply, Hydro & Construction Drivers, Warehousemen and Helpers Local 230, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. Bot Construction Canada Limited, (Respondent).

Unit: "all truck drivers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all truck drivers in the employ of the respondent in all other sectors in the County of Simcoe and the District Municipality of Muskoka, save and except non-working foremen and person above the rank of non-working foreman". (11 employees in Unit).

1770-81-R: Labourers' International Union of North America, Local 506, (Applicant) v. Bestview Services Limited, (Respondent).

Unit: "all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all construction labourers in the employ of the respondent in all other sectors in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman". (4 employees in unit).

Bargaining Agents Certified Subsequent to a Pre-Hearing Vote

2759-80-R: Retail, Wholesale and Department Store Union, AFL:CIO:CLC, (Applicant) v. K-Mart Canada Limited, (Respondent).

Unit #2: "all employees of the respondent at its K-Mart Store in St. Catharines, Ontario regularly employed for not more than twenty-four hours per week and students employed during the school vacation period, save and except department managers, persons above the rank of department managers, persons above the rank of department manager, management trainees, pharmacists, and office and clerical staff". (40 employees in unit).

Number of names of persons on revised voters' list	40
Number of persons who cast ballots	36
Number of ballots marked in favour of applicant	23
Number of ballots marked against applicant	13

Unit #1: (*See Applications for Certification Dismissed — Pre Hearing Vote*).

1414-81-R: Bakery, Confectionery & Tobacco Workers Int'l Union Local 322 Ottawa, Ontario, (Applicant) v. The Walker Bakeries Ltd. (Division of General Bakeries Ltd.), (Respondent).

Unit: "all driver-salesmen and drivers in the employ of the respondent at Ottawa, save and except supervisors, persons above the rank of supervisor and persons classified as stale room employees". (13 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on list as originally prepared by employer		14
Number of persons who case ballots	13	
Number of spoiled ballots	1	
Number of ballots marked in favour of applicant	10	
Number of ballots marked against applicant	1	

1443-81-R: Amalgamated Clothing and Textile Workers Union — Toronto Joint Board, (Applicant) v. Weston Apparel Manufacturing Company, Division of Dylex Limited, (Respondent) v. Toronto Joint Board Locals 14-83-92-94 of the International Ladies' Garment Workers' Union, (Intervener).

Unit: "all employees of the respondent at 965 Weston Road, Toronto, save and except foremen and foreladies, persons above the rank of foreman and forelady, filed staff, shippers and office staff". (445 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters' list		434
Number of persons who case ballots	398	
Number of spoiled ballots	2	
Number of ballots marked in favour of applicant	252	
Number of ballots marked in favour of intervener	143	
Ballots segregated and not counted	1	

1450-81-R: United Steelworkers of America, (Applicant) v. C. H. Heist (Canada) Limited, (Respondent) v. Christian Labour Association of Canada, (Intervener).

Unit: "all employees of the respondent employed in Hydro cleaning and dry and wet vacuum cleaning and all other employees classified under schedule "B" working at or our of Hamilton, Ontario, save and except non-working foremen and persons above the rank of non-working foreman and employees covered by all subsisting collective agreements between the respondent and the International Brotherhood of Painters and Allied Trades and/or the Ontario Council of the International Brotherhood of Painters and Allied Trades and/or the various Locals of the International Brotherhood.

Number of names of persons on list as originally prepared by employer		24
Number of persons who cast ballots	14	
Number of spoiled ballots	1	
Number of ballots marked in favour of applicant	12	
Number of ballots marked in favour of intervener	1	

Bargaining Agents Certified Subsequent to a Post-Hearing Vote

0452-81-R: Service Employees' Union, Local 478 A.F.L., C.I.O., C.L.C., (Applicant) v. The Empire Hotel Company of Timmins Limited, (Respondent).

Unit: "all employees of the respondent in North Bay, Ontaio, regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except supervisors, persons above the rank of supervisor, office and sales staff, payroll clerks, accounting clerks, audit department staff and security staff". (35 employees in unit).

Number of names of persons on revised voters list		34
Number of persons who cast ballots	14	
Number of ballots marked in favour of applicant	9	
Number of ballots marked against applicant	2	
Ballots segregated and not counted	3	

1333-81-R: Canadian Union of Public Employees, (Applicant) v. Villa Columbo Home for the Aged Inc., (Respondent) v. Ontario Nurses' Association, (Intervener).

Unit: "all employees of the respondent at Metropolitan Toronto, regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period, save and except professional medical staff, registered and graduate nurses, office and clerical staff, supervisors and persons above the rank of supervisor". (16 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters' list		21
Number of persons who cast ballots		6
Number of ballots marked in favour of applicant	3	
Number of ballots marked against applicant	1	
Ballots segregated and not counted	2	

1364-81-R: Laundry and Linen Drivers and Industrial Workers Union, Local 847, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. Temple Wire Products Ltd., (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent in Metropolitan Toronto, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period". (30 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on list as originally prepared by employer		35
Number of persons who cast ballots		32
Number of ballots marked in favour of applicant	22	
Number of ballots marked against applicant	10	

1368-81-R: Ontario Public Service Employees Union, (Applicant) v. The Brant County Board of Education, (Respondent).

Unit #2: "all occasional teachers in the elementary panel regularly employed by the respondent for not more than 24 hours per week in the County of Brant, Ontario". (11 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on list as originally prepared by employer		83
Number of persons who cast ballots		39
Number of ballots marked in favour of applicant	26	
Number of ballots marked against applicant	13	

Unit #1: (*See Bargaining Agents Certified — No Vote Conducted*)

1503-81-R: International Union of Operating Engineers, Local 793; (Applicant) v. York Sanitation Company, Division of W.M.I. Waste Management of Canada Inc., (Respondent) v. Oil & Gas Technicians, Service, Domestic & Ge. Worker Union, Local 1267 L.I.U.N.A., (Intervener).

Unit: "all employees of the respondent working in and around Metropolitan Toronto, the Region of York, County of Simcoe, County of Dufferin, Region of Peel and the Region of Durham, save and except foreman, persons above the rank of foreman, office staff, persons regularly employed for not more than twenty-four (24) hours per week and students hired for vacation periods". (47 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters' list		49
Number of persons who cast ballots		45
Number of ballots marked in favour of applicant	44	
Number of ballots marked against applicant	1	

1504-81-R: Canadian Union of Operating Engineers & General Workers, (Applicant) v. Promotional Packaging Products Limited, (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent at its plant in Mississauga, Ontario save and except office staff, foremen and those above the rank of foreman, and students employed during the school vacation period". (42 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters' list		40
Number of persons who cast ballots	39	
Number of ballots marked in favour of applicant	23	
Number of ballots marked against applicant	16	

APPLICATIONS FOR CERTIFICATION DISMISSED

No Vote Conducted

0688-77-R: Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers, (Applicant) v. Brewers' Warehousing Company Limited, (Respondent).

2226-80-R: Canadian Union of Public Employees, (Applicant) v. Owen Sound Public Utilities Commission, (Respondent).

0001-81-R: United Steelworkers of America, (Applicant) v. Stanley Precision, Inc., (Respondent) v. Group of Employees, (Objectors).

0107-81-R: International Union of Operating Engineers, Local 793, (Applicant) v. Lamco Construction Ltd., (Respondent).

0883-81-R: Labourers' International Union of North America Ontario Provincial District Council, (Applicant) v. Selton Engineering Construction Inc., (Respondent) v. International Union of Operating Engineers, Local 793, (Intervener).

1104-81-R: International Union of Operating Engineers, Local 793, (Applicant) v. E. C. King Contracting, a Division of Morcam Group Limited, (Respondent).

1185-81-R: Service Employees Union, Local 204 Affiliated with A.F. of L., C.I.O., C.L.C., (Applicant) v. The Trustees of the Toronto General Burying Grounds, (Respondent).

1219-81-R: Canadian Union of Operating Engineers & General Workers, (Applicant) v. Cryovac Division W.R. Grace & Co. of Canada Limited, (Respondent) v. Group of Employees, (Objectors).

1326-81-R: Labourers' International Union of North America, Local 183, (Applicant) v. Marchant Property Management (A Division of Marchant & Company Ltd.), (Respondent).

1384-81-R: Fuel, Bus, Limousine, Petroleum Drivers and Allied Employees Local Union No. 352, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. Natomas of Canada Ltd. appearing under the trade name of Premium Oil Company, (Respondent) v. Group of Employees, (Objectors).

1457-81-R: Service Employees Union, Local 204 Affiliated with A.F. of L., C.I.O., C.L.C., (Applicant) v. Toronto East General and Orthopaedic Hospital Inc., (Respondent) v. Group of Employees, (Objectors).

1545-81-R: Canadian Union of Public Employees, (Applicant) v. The Corporation of the Town of Leamington, (Respondent) v. Group of Employees, (Objectors).

1557-81-R: Service Employees Union, Local 204 Affiliated with A.F. of L., C.I.O., C.L.C., (Applicant) v. The Ontario Cancer Institute, (Respondent).

1592-81-R: Amalgamated Clothing & Textile Workers Union, AFL-CIO-CLC, (Applicant) v. Vagden Mills Limited, (Respondent).

1601-81-R: London and District Service Workers' Union, Local 220 SEIU — AFL-CIO-CLC, (Applicant) v. Mason Villa (London) Limited, (Respondent) v. Group of Employees, (Objectors).

1602-81-R: London and District Service Workers' Union, Local 220 SEIU — AFL-CIO-CLC, (Applicant) v. Mason Villa (London) Limited, (Respondent) v. Group of employees, (Objectors).

1662-82-R: Canadian Paperworkers Union, (Applicant) v. Olav Haavaldsrud Timber Co. Ltd., (Respondent) v. Lumber and Sawmill Workers Union, Local 2995 of the United Brotherhood of Carpenters and Joiners of America, (Intervener).

1768-81-R: The Carpenters' District Council of Toronto and Vicinity on behalf of Local 27, 666, 681, 1133, 1747, 1963, 1304, 3227, and 3233, United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Bondfield Construction Co. Ltd., (Respondent).

Applications for Certification Dismissed Subsequent to a Pre-Hearing Vote

2759-80-R: Retail, Wholesale and Department Store Union, AFL:CIO:CLC, (Applicant) v. K-Mart Canada Limited, (Respondent).

Unit #1: "all employees of the respondent at its K-Mart Store in St. Catharines, Ontario save and except department managers, persons above the rank of department manager, management trainees, pharmacists office and clerical staff, persons regularly employed for not more than twenty-four hours per week, and students employed during the school vacation period". (59 employees in unit).

Number of names of persons on revised voters' list	62
Number of persons who cast ballots	61
Number of ballots marked in favour of applicant	23
Number of ballots marked against applicant	38

Unit #2: (*See Bargaining Agents Certified Subsequent to a Pre-Hearing Vote*).

0493-81-R: International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (U.A.W.), (Applicant) v. Tri-Canada Inc., (Respondent) v. Tri-Canada Employees' Association, (Intervener #1) v. United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 46, (Intervener #2).

Unit: "all employees of the respondent in Mississauga, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff and those employees presently represented by the Plumbers of Steamfitters Union Association Local 46". (61 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on list as originally prepared by employer	57
Number of persons who case ballots	49
Number of ballots marked in favour of applicant	23
Number of ballots marked against applicant	25
Ballots segregated and not counted	1

1441-81-R: United Electrical, Radio and Machine Workers of America (UE), (Applicant) v. Murata Erie North America, Inc., (Respondent).

Unit: "all employees of the respondent in Trenton, Ontario, save and except foremen those above the rank of foreman, office and sales staff". (567 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters' list	575
Number of persons who cast ballots	556
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	205
Number of ballots marked against applicant	301
Ballots segregated and not counted	49

1568-81-R: United Electrical, Radio and Machine Workers of America (UE), (Applicant) v. BBF Machine Shop, (Respondent).

Unit: "all employees of the respondent in the Region of Hamilton-Wentworth save and except foremen, persons above the rank of foreman, office and sales staff". (28 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons of list as originally prepared by employer	26
Number of persons who cast ballots	25
Number of ballots marked in favour of applicant	10
Number of ballots marked against applicant	14
Ballots segregated and not counted	1

Applications for Certification Dismissed Subsequent to a Post-Hearing Vote

0645-81-R: Hotel, Restaurant and Cafeteria Employees Union, Local 75, (Applicant) v. Waldorf Astoria Hotel, (Respondent).

Unit #1: "all employees of the respondent at the Waldorf Astoria Hotel in the Municipality of Metropolitan Toronto, save and except head housekeeper, those above the rank of head housekeeper, office staff, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period". (16 employees in unit). (*Having regard to the partial agreement of the parties*).

Number of names of persons on revised voters' list	16
Number of persons who cast ballots	13
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	3
Number of ballots marked against applicant	9

Unit: #2: "all employees of the respondent at the Waldorf Astoria Hotel regularly employed for not more than twenty-four hours per week and students employed during the school vacation period, save and except head housekeeper, persons above the rank of head-housekeeper, and office staff". (5 employees in unit). (*Having regard to the partial agreement of the parties*).

Number of names of persons on revised voters' list	6
Number of persons who cast ballots	4
Number of ballots marked in favour of applicant	1
Number of ballots marked against applicant	3

0847-81-R; 0848-81-R: Service Employees Union, Local 204, affiliated with A.F. of L., C.I.O., C.L.C., (Applicant) v. Creeden Valley Nursing Home Limited, (Respondent) v. Group of Employees, (Objectors).

Unit #1: "all registered nurses and graduate nurses employed by the respondent in the Town of Creemore, County of Simcoe, save and except nursing director, supervisors, and persons above the rank of supervisor". (57 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters' list		5
Number of persons who cast ballots		4
Number of ballots marked in favour of applicant	1	
Number of ballots marked against applicant	3	

Unit #2: "all employees of the respondent, in the Town of Creemore, County of Simcoe, save and except registered nurses, graduate nurses, supervisors, persons above the rank of supervisor, and office staff". (57 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters' list		47
Number of persons who cast ballots		46
Number of ballots marked in favour of applicant	1	
Number of ballots marked against applicant	45	

1047-81-R: United Brotherhood of Carpenters and Joiners of America Local 1190, (Applicant) v. J. Ryback, (Respondent).

Unit: "all carpenters' apprentices in the employ of the respondent in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman". (13 employees in unit).

Number of names of persons on list as originally prepared by employer		12
Number of persons who cast ballots		11
Number of ballots marked in favour of applicant	0	
Number of ballots marked against applicant	11	

1440-81-R: Teamsters Local Union 2175, Chemical, Energy & Allied Workers affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. Deb Swarfega Limited, (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent at Waterford, Ontario, save and except foremen, those above the rank of foreman, office and technical and sales staff, and persons regularly employed for not more than twenty-four hours per week and students employed in the school vacation period". (6 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on list as originally prepared by employer		6
Number of persons who cast ballots		5
Number of ballots marked in favour of applicant	2	
Number of ballots marked against applicant	3	

1448-81-R: Graphic Arts International Union, Local 542, (Applicant) v. Image Design & Print Limited, (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent at Hamilton, save and except non-working foremen, persons, above the rank of non-working foreman, office and sales staff, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period". (13 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on list as originally prepared by employer		13
Number of persons who cast ballots	10	
Number of ballots marked in favour of applicant	2	
Number of ballots marked against applicant	8	

APPLICATIONS FOR CERTIFICATION WITHDRAWN

1484-81-R: Labourers' International Union of North America, Local 506, (Applicant) v. Bestview Holdings Limited, (Respondent).

1493-81-R: United Food and Commercial Workers International Union C.L.C., A.F.L.-C.I.O., (Applicant) v. Susan Shoe Industries Limited, (Respondent).

1514-81-R: International Union of Operating Engineers, Local 793, (Applicant) v. Finch Paving, (Respondent).

1534-81-R: Canadian Union of Public Employees, (Applicant) v. Kingston and District Association of the Mentally Retarded (Respondent).

1578-81-R: Service Employees International Union, Local 183 A. F. of L., C.I.O., C.L.C., (Applicant) v. Belleville Plaza, (Respondent).

1596-81-R: United Brotherhood of Carpenters and Joiners of America, Local Union 1669, (Applicant) v. Befaro Home Improvements and Building Supplies, (Respondent).

1630-81-R: Labourers International Union of North America, Local Union 493, (Applicant) v. B.E.S.T. Construction of Sudbury Ltd., (Respondent).

1645-81-R: Union of Bank Employees Local 2104 (Ontario) C.L.C., (Applicant) v. Brant Community Credit Union Ltd., (Respondent).

1660-81-R: International Brotherhood of Painters and Allied Trades — Local Union 1891, (Applicant) v. Paola Painting, (Respondent).

1661-81-R: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 552, (Applicant) v. Fahringer Mechanical Contracting Limited, (Respondent).

1698-81-R: Service Employees Union, Local 478, (Applicant) v. Belvedere Heights Home for the Aged, (Respondent).

1707-81-R: Ready-Mix, Building Supply, Hydro & Construction Drivers, Warehousemen and Helpers Local 230, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. Fowler Construction Co. Limited, (Respondent).

1708-81-R: L.I.U.N.A. Local 491, (Applicant) v. Servco Refractories, (Respondent).

1743-81-R: International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, (U.A.W.), (Applicant) v. Superior Metal Finishing Ltd., (Respondent).

1798-81-R: Canadian Union of Public Employees, (Applicant) v. Messrs. Yielding and Morrison carrying on business as Downtown Parking, (Respondent).

APPLICATIONS FOR DECLARATION OF RELATED EMPLOYER

2146-80-R: United Food and Commercial Workers International Union, (Applicant) v. Sunnylea Foods Limited, Maple Leaf Egg Products Ltd., and Turkstra's Eggs Ltd., (Respondents). (*Dismissed*).

1403-81-R: Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftsmen, (Applicant) v. Londong Caulking and Installations Limited, and Pro-Tech Weatherproofing Inc., (Respondents). (*Granted*).

1420-81-R: The Toronto Central-Ontario Building and Construction Trades Council on its own behalf and on behalf of its affiliates, (Applicant) v. Brad-Jay Investments Limited and Buckaroo Investments Limited, (Respondent). (*Granted*).

SALE OF A BUSINESS

2147-80-R: United Food and Commercial Workers International Union, (Applicant) v. Sunnylea Foods Limited, Maple Leaf Egg Products Ltd., and Turkstra's Eggs Ltd., (Respondents). (*Dismissed*).

0491-81-R: Service Employees' Union, Local 204, A.F.L.-C.I.O.-C.L.C., (Applicant) v. Prudent Investments Inc., (Respondent). (*Granted*).

1403-81-R: Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftsmen, (Applicant) v. London Caulking and Installations Limited, and Pro-Tech Weatherproofing Inc., (Respondents). (*Granted*).

1419-81-R: The Toronto Central-Ontario Building and Construction Trades Council on its own behalf and on behalf of its affiliates, (Applicant) v. Brad-Jay Investments Limited and Buckaroo Investments Limited, (Respondent). (*Granted*).

APPLICATIONS FOR DECLARATION TERMINATING BARGAINING RIGHTS

1335-81-R: The Employees of Heritage Wood Stove Co. Employees Represented by Randy Beamish, (Applicant) v. United Steelworkers of America, (Respondent) v. Heritage Wood Stove Co., (Intervener).

Unit: "all employees of Heritage Wood Stove Co. in Collingwood, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff." (*Granted*).

Number of names of persons on list as originally prepared by employer		42
Number of persons who cast ballots	31	
Number of ballots marked in favour of respondent	0	
Number of ballots marked against respondent	31	

1407-81-R: Gaetane Blom and Susan Balzer, (Applicants) v. Independent Canadian Steelworkers' Union, (Respondent) v. Lely Ltd., (Intervener).

Unit: "all employees of Lely Limited employed at the Lely plant on North Service Road in Burlington, save and except office staff, foremen, and persons above the rank of foreman." (*Granted*).

1541-81-R: Stewart Merrifield, (Applicant) v. International Union of Operating Engineers, Local 793, (Respondent) v. The Corporation of the Town of Meaford, (Intervener).

Unit: “all employees of the Corporation of the Town of Meaford working in the Town of Meaford, save and except foreman, office staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period.” (*Terminated*).

1572-81-R: Kenneth Robert Shank, Ann Thomson, Douwinus Horst, Inga Hoepfner, Olgnts Snstins, (Applicants) v. Graphic Arts International Union, Local 542, (Respondent). (*Dismissed*).

1581-81-R: Charles Jacklin, (Applicant) v. Teamsters, Chauffeurs, Warehousemen and Helpers, Local No. 91, (Respondent) v. Belfor & Co. Limited, (Employer).

Unit: “all employees of Belfor & Co. Limited in the Regional Municipality of Ottawa-Carleton, save and except foremen, persons above the rank of foreman, office, sales staff, and security guards.” (*Granted*).

APPLICATIONS FOR DECLARATION OF UNLAWFUL STRIKE

1565-81-U: Hickeson-Langs Supply Company Toronto Branch, (Applicant) v. Paul Moore, Leonard Williams et al, (Respondents). (*Withdrawn*).

1717-81-U: Nicholls Radtke & Associates Limited, (Applicant) v. The International Association of Bridge, Structural and Ornamental Iron Workers, Local 759, Larry Baillie, Robert Stoppel, William MacLaurin and Robert L. McGregor, (Respondents). (*Granted*).

1737-81-U & 1738-81-U: Mechanical Contractors Association Hamilton, Marcotte Mechanical (Eastern) Limited, (Applicants) v. Sheet Metal Workers Union, Local 537 & 568, and Philip Trottier, (Respondents). (*Granted*).

APPLICATION FOR CONSENT TO PROSECUTE

1091-81-U: Antonio Valente, (Complainant) v. Michael Sullivan, and Local 247 of the Labourers' International Union of North America, (Respondents). (*Dismissed*).

COMPLAINTS OF UNFAIR LABOUR PRACTICE

2145-80-U: United Food and Commercial Workers International Union, (Complainant) v. Sunnylea Foods Limited; Maple Leaf Egg Products Ltd.; Turkstra's Eggs Ltd.; Jacob Zonneveld, (Respondents). (*Granted*).

0036-81-U: Canadian Brotherhood of Railway Transport and General Workers, (Complainant) v. Cara Urban Restaurant/Inn Division, (Respondent). (*Granted*).

0224-81-U: International Beverage Dispensers & Bartenders Union, Local 280, (Complainant) v. Cloverleaf Hotel Division of MIB Holdings Ltd., (Respondent). (*Withdrawn*).

0471-81-U: Kunit James, (Complainant) v. Amalgamated Clothing Workers of America, (Respondent). (*Dismissed*).

0859-81-U: Canadian Textile & Chemical Union, (Complainant) v. Albert Sliwinski Ltd. (carrying on business as Avon Sportswear), (Respondent). (*Dismissed*).

1089-81-U: Antonio Valente, (Complainant) v. Michael Sullivan, and Local 247 of the Labourers' International Union of North America, (Respondent). (*Dismissed*).

1090-81-U: Antonio Valente, (Complainant) v. Michael Sullivan, and Local 247 of the Labourers' International Union of North America, (Respondents). (*Dismissed*).

1192-81-U: United Food & Commercial Workers International Union C.L.C., A.F.L.-C.I.O., (Complainant) v. Footwear Fashions Limited, (Respondent). (*Withdrawn*).

1193-81-U: United Food & Commercial Workers International Union C.L.C., A.F.L.-C.I.O., (Complainant) v. Footwear Fashions Limitd and Scott Beech, (Respondent). (*Withdrawn*).

1194-81-U: United Food & Commercial Workers International Union, (Complainant) v. Footwear Fashion Limited and Joe Chicutti, (Respondent). (*Withdrawn*).

1233-81-U: United Food & Commercial Workers International Union, (Complainant) v. Footwear Fashions Limited, (Respondent). (*Withdrawn*).

1234-81-U: United Food & Commercial Workers International Union, (Complainant) v. Footwear Fashions Limited, (Respondent). (*Withdrawn*).

1279-81-U: Milk and Bread Drivers, Dairy Employees, Caterers and Allied Employees, Local Union No. 647, (Complainant) v. Silverwood Dairies Limited, Division of Silverwood Industries Limited (London Operation) and Office & Professional Employees International Union, Local 473, (Respondents). (*Dismissed*).

1582-81-U: International Woodworkers of America, (Complainant) v. Electrical Contacts Limited (Respondent). (*Withdrawn*).

1591-81-U: Ottawa Civil Service Recreational Association, (Complainant) v. Canadian Brotherhood of Railway, Transport and General Workers, (Respondent). (*Withdrawn*).

1593-81-U: Laundry and Linen Drivers and Industrial Workers Union, Local 847, affiliated with the International Brotherhood of Chauffeurs, Warehousemen and Helpers of America, (Complainant) v. Temple Wire Products Ltd., (Respondent). (*Withdrawn*).

1494-81-U: Commercial Workers Union Local 486, (Applicant) v. Hofmann Balancing Techniques Ltd., (Respondent). (*Withdrawn*).

1595-81-U: International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada Local No. B173, (Complainant) v. Royal Alexandra Theatre, the registered business name and style of Ed Mirvish Enterprises Limited, (Respondent). (*Withdrawn*).

1613-81-U: Teamsters, Chemical Energy and Allied Workers Local Union 424, (Complainant) v. Canadian Admiral Corporation Limited, (Respondent). (*Withdrawn*).

1620-81-U: Laundry and Linen Drivers and Industrial Workers Union, Teamsters Local 847, affiliated with the International Brotherhood of Chauffeurs, Warehousemen and Helpers of America, (Complainant) v. Temple Wire Products Ltd. (Respondent). (*Withdrawn*).

1631-81-U: Canadian Union of Public Employees, (Complainant) v. Country Place Residence, (Respondent). (*Withdrawn*).

1653-81-U: United Rubber, Cork, Linoleum and Plastic Workers of America, AFL-CIO-CLC, (Complainant) v. Diverse Blending Limited, (Respondent). (*Withdrawn*).

1657-81-U: Mutuel Employees' Association, Local 528, Service Employees' International Union, (Complainant) v. Flamboro Downs Limited, (Respondent). (*Withdrawn*).

1682-81-U: Teamsters, Chauffeurs, Warehousemen and Helpers Local Union No. 91, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Complainant) v. Ottawa Commercial Realities Limited, (Respondent). (*Withdrawn*).

1696-81-U: Service Employees' International Union, Local 204, (Complainant) v. Canadian Bonded Credit, (Respondent). (*Withdrawn*).

1709-81-U: Antoine Akouri (Complainant) v. The Ontario Taxi Association Local 1688 and some of its Representatives, (Respondent). (*Withdrawn*).

1762-81-U: Millworkers Local #802 United Brotherhood of Carpenters and Joiners of America, (Complainant) v. Arnold Manufacturing Limited, (Respondent). (*Withdrawn*).

1774-81-U: Service Employees Union Local 478, (Complainant) v. Empire Hotel Company of Timmins, Limited, (Respondent). (*Withdrawn*).

COMPLAINTS UNDER THE OCCUPATIONAL HEALTH AND SAFETY ACT

0384-81-OH: Laurie Meaden, (Complainant) v. Tal Swartz, carrying on business under the name of AMS Diamonds, (Respondent). (*Granted*).

0470-81-OH: Ted Nickarz, (Complainant) v. Union Miniere Explorations and Mining Corporation, (Respondent). (*Dismissed*).

APPLICATIONS FOR RELIGIOUS EXEMPTION

0429-81-M: Douglas N. Butler, (Applicant) v. The York University Faculty Association, (Respondent Trade Union) v. The Board of Governors of York University, (Respondent Employer). (*Dismissed*).

0457-81-M: Kevin James McGrath, (Applicant) v. United Steelworkers of America, Local 8533, (Respondent Trade Union) v. Umex Corp. Ltd., (Respondent Employer). (*Dismissed*).

APPLICATION FOR CONSENT TO EARLY TERMINATION OF COLLECTIVE AGREEMENT

1544-81-M: Canadian Union of Public Employees, and its Local 152, (Trade Union) v. The Corporation of the Township of Atikokan, (Employer). (*Granted*).

JURISDICTIONAL DISPUTES

0742-81-JD: International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Local 128, (Complainant) v. Sheaffer-Townsend Construction Limited and United Association of Journeymen & Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 67, (Respondent). (*Dismissed*).

1215-81-JD: Joseph Brant Memorial Hospital, (Complainant) v. International Union of Operating Engineers, Local 772, and Canadian Union of Public Employees, Local 1065, (Respondent). (*Dismissed*).

1279-81-U: Milk and Bread Drivers, Dairy Employees, Caterers and Allied Employees, Local Union No. 647, (Complainant) v. Silverwood Dairies Limited, Division of Silverwood Industries Limited (London Operation) and Office & Professional Employees International Union, Local 473, (Respondent). (*Dismissed*).

APPLICATIONS FOR DETERMINATION OF EMPLOYEES STATUS

1710-80-M: S.O.N.G., Local 87, (Applicant) v. The Newspaper Guild and Toronto Star Newspapers Limited, (Respondent). (*Withdrawn*).

1287-81-M: Canadian Union of Public Employees, (Applicant) v. Jewish Vocational Services, (Respondent). (*Withdrawn*).

1374-81-M: Susan Shoe Industries Limited, (Applicant) v. Health, Office and Professional Employees, Local 1976, (Respondent). (*Withdrawn*).

1659-81-M: North York Civic Employees Union Local 94, Canadian Union of Public Employees, (Applicant) v. City of North York, (Respondent). (*Withdrawn*).

CONSTRUCTION INDUSTRY GRIEVANCES

1321-80-M: Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27, 666, 681, 1133, 1747, 1963, 1304, 3227 and 3233, United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Harbridge & Cross Ltd., (Respondent) v. The Carpenters' Employer Bargaining Agency (E.B.A.), (Intervener #1) v. Local 506, International Labourers Union of North America, (Intervener #2) v. Pre-Con Company, a Division of St. Marys Cement Limited, (Intervener #3). (*Withdrawn*).

2810-80-M: United Brotherhood of Carpenters and Joiners of America, Local 2486, (Applicant) v. Suburban Lathing & Acoustics Limited, (Respondent). (*Granted*).

1182-81-M: Labourers' International Union of North America, Local 1059, (Applicant) v. George Wimpey of Canada Limited, (Respondent). (*Withdrawn*).

1404-81-M: International Association of Heat and Frost Insulators and Asbestos Workers, Local 95, (Applicant) v. White and Greer Company Limited and The Master Insulators' Association of Ontario, Incorporated, (Respondents). (*Granted*).

1405-81-M: International Association of Heat and Frost Insulators and Asbestos Workers, Local 95, (Applicant) v. White and Greer Company Limited and The Master Insulators' Association of Ontario, Incorporated, (Respondents). (*Dismissed*).

1431-81-M: International Association of Heat and Frost Insulators and Asbestos Workers, Local 95, (Applicant) v. Per-fec-tion Insulation Limited, (Respondent). (*Granted*).

1465-81-M: International Union of Operating Engineers, Local 793, (Applicant) v. Employer Bargaining Agency and Endexa Construction Ltd., (Respondent). (*Withdrawn*).

1471-81-M: Labourers' International Union of North America, Local 183, (Applicant) v. The Ontario Form Work Association and Westside Construction Ltd., (Respondent). (*Granted*).

1495-81-M: United Brotherhood of Carpenters and Joiners of America, Local 1988, (Applicant) v. Cornerstone Engineering Ltd., (Respondent). (*Granted*).

1509-81-M: Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27, 666, 681, 1133, 1304, 1747, 1963, 3227 and 3233, United Brotherhood of Carpenters' and Joiners of America, (Applicant) v. Introm Industries Limited, (Respondent). (*Withdrawn*).

1517-81-M: Labourers' International Union of North America, Local 183, (Applicant) v. Salvador Excavating Ltd., (Respondent). (*Withdrawn*).

1523-81-M: Labourers' International Union of North America, Local 506, (Applicant) v. End Exa Construction Limited, (Respondent). (*Granted*).

1528-81-M: The International Brotherhood of Painters and Allied Trades and the Ontario Council of the International Brotherhood of Painters and Allied Trades, & The International Brotherhood of Painters and Allied Trades, Local 1795, (Applicant) v. Architectural Glass and Metal Contractors Association & Bath and Sons Glass Ltd., (Respondent). (*Withdrawn*).

1563-81-M: United Brotherhood of Carpenters and Joiners of America, Local 2486, (Applicant) v. Belanger Construction Limited, (Respondent). (*Granted*).

1567-81-M: United Brotherhood of Carpenters and Joiners of America, Local Union 1669, (Applicant) v. Tamarron Group Inc., (Respondent). (*Withdrawn*).

1570-81-M: International Association of Heat and Frost Insulators and Asbestos Workers, Local 95, (Applicant) v. H & L Industrial Insulation Inc., (Respondent). (*Withdrawn*).

1571-81-M: International Association of Heat and Frost Insulators and Asbestos Workers, Local 95, (Applicant) v. H & L Industrial Insulation Inc., (Respondent). (*Withdrawn*).

1585-81-M: Labourers' International Union of North America, Local 527, (Applicant) v. Eton Construction Ltd., (Respondent). (*Granted*).

1603-81-M: International Brotherhood of Painters and Allied Trades and Ontario Council of the International Brotherhood of Painters and Allied Trades — Local 1891, (Applicant) v. Malec Acoustic & Drywall Ltd. Malec Building Products Ltd., (Respondents). (*Granted*).

1606-81-M: International Brotherhood of Painters and Allied Trades and Ontario Council of the International Brotherhood of Painters and Allied Trades — Local Union (1981), (Applicant) v. Troup John M.M. Ltd., (Respondent). (*Withdrawn*).

1615-81-M: International Association of Heat and Frost Insulators and Asbestos Workers, Local 95, (Applicant) v. White & Greer Co., (Respondent). (*Withdrawn*).

1616-81-M: International Association of Heat and Frost Insulators and Asbestos Workers Local 95, (Applicant) v. Reliable Insulation, (Respondent). (*Withdrawn*).

1617-81-M: International Association of Heat and Frost Insulators and Asbestos Workers, Local 95, (Applicant) v. Horton C. B. I. Ltd., (Respondent). (*Withdrawn*).

1618-81-M: International Association of Heat and Frost Insulators and Asbestos Workers, Local 95, (Applicant) v. Industrial Commercial Insulation & Contracting (Sault) Ltd., (Respondent). (*Withdrawn*).

1619-81-M: International Association of Heat and Frost Insulators and Asbestos Workers, Local 95, (Applicant) v. Richardson Brothers Insulation Ltd., (Respondent). (*Withdrawn*).

1624-81-M & 1625-81-M: International Union of Operating Engineers, Local 793, (Applicant) v. Employer Bargaining Agency and its affiliate Williams Contracting Ltd., (Respondents). (*Granted*).

1628-81-M: International Association of Bridge, Structural and Ornamental Ironworkers, Local Union 721, (Applicant) v. Provincial Steel, (Respondent). (*Granted*).

1635-81-M: United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 46, (Applicant) v. Burlington Mechanical Installations, (Respondent). (*Withdrawn*).

1639-81-M: United Association of Journeymen Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 46, (Applicant) v. Industrial Maintenance Company, (Respondent). (*Withdrawn*).

1640-81-M: United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 46, (Applicant) v. Sheaffer Townsend Ltd., (Respondent). (*Withdrawn*).

1649-81-M: Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27, 666, 681, 1133, 1304, 1747, 1963, 3227, and 3233, United Brotherhood of Carpenters' and Joiners of America, (Applicant) v. B. & H. Woodworkers, (Respondent). (*Dismissed*).

1651-81-M: United Brotherhood of Carpenters and Joiners of America, Local 446, (Applicant) v. Jaddco Anderson Limited, (Respondent). (*Granted*).

1692-81-M: Lake Ontario District Council, on behalf of Locals 1450, 397, 572 and 1071, United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Bradsill Ltd., (Respondent). (*Granted*).

1693-81-M: Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27, 666, 681, 1133, 1304, 1747, 1963, 3227 and 3233, United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Comstock International Limited, (Respondent). (*Withdrawn*).

1694-81-M: International Union of Operating Engineers, Local 793, (Applicant) v. Employer Bargaining Agency and its Affiliate Serit Construction Limited, (Respondent). (*Withdrawn*).

1695-81-M: International Union of Operating Engineers, Local 793, (Applicant) v. Employer Bargaining Agency and its Affiliate Serit Construction Limited, (Respondent). (*Granted*).

1703-81-M: International Union of Operating Engineers, Local 793, (Applicant) v. Employer Bargaining Agency and its affiliate Bellai Brothers Ltd., (Respondent). (*Granted*).

1704-81-M: Drywall, Acoustic, Lathing and Insulation Local 675 of the United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Readywall Ltd., (Respondent). (*Withdrawn*).

1731-81-M: United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 787, (Applicant) v. Perrin-Turner Limited, (Respondent). (*Withdrawn*).

1767-81-M: United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 67, & The Ontario Pipe Trades Council, (Applicants) v. Blok Mechanical, and The Mechanical Contractors Association, (Respondents). (*Granted*).

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1188-77-R: London and District Services Workers' Union, Local 220 S.E.I.U., A.F.L.-C.I.O.-C.L.C., (Applicant) v. University Hospital owned and operated by London Health Association, (Respondent). (*Denied*).

1027-81-R: Fur Workers' Union — Local 82, affiliated with United Food & Commercial Workers' International Union, AF of L-CIO-CLC, (Applicant) v. Alpha Shoe Corporation, (Respondent) v. Group of Employees, (Objectors). (*Dismissed*).

*Ontario Labour Relations Board,
400 University Avenue,
Toronto, Ontario*

ISSN 0383-4778



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*Ontario Labour Relations Board,
400 University Avenue,
Toronto, Ontario*

ISSN 0383-4778

AUG 17 1983

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